Boston College International and Comparative Law Review

Volume 22 | Issue 1 Article 4

12-1-1999

Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate

James Stribopoulos

Lessons From the Pupil: A Canadian Solution to the American Exclusionary Rule Debate

*James Stribopoulos**

INTRODUCTION

Modern constitutional documents frequently incorporate specific restraints on police investigatory powers. These provisions typically supplement guarantees aimed at ensuring fair standards in the criminal process, for those detained or charged with a crime.[1] Most of these documents echo themes first articulated in the United States' Bill of Rights[2] and reiterated centuries later in the Universal Declaration of Human Rights.[3]

---

* B.A. (York University, 1995), LL.B. (Osgoode Hall Law School, 1994), LL.M. (Columbia University School of Law, 1997). Member of the Ontario Bar, presently practicing criminal law as a trial and appellate lawyer with Fleming, Breen Barristers of Toronto.

This paper was submitted in partial fulfillment of the requirements for the degree of Master of Laws (LL.M.) at Columbia University School of Law, in the City of New York. I would like to thank Professor Debra Livingston (Columbia University), Professor Louis Henkin (Columbia University), Gary Svirsky (Columbia LL.M. 1997), Peter Danchin (Columbia University, LL.M., 1997), Martijn VanMaanen (Columbia, LL.M., 1997), and Karen Brimberg (John Jay College of Criminal Justice), all of whom read earlier drafts of this paper. A special debt of gratitude is owed to Professor Gerard Lynch (Columbia University) who provided immeasurable assistance through his insightful comments and suggestions. Of course, any errors remain mine alone.

[1] *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §§ 7–14 [hereinafter "the Canadian *Charter*" or "the *Charter*"]; IR. CONST. art. 40, para. 5; New Zealand Bill of Rights Act, No. 109 (1990), §§ 9, 21–27; REP. OF SOUTH AFRICA CONST. (Act 200 of 1993), as amended, (South African Bill of Rights), §§ 13, 25.

[2] U.S. CONST. amend. IV (prohibition against unreasonable searches and seizures); amend. V (right not to stand trial for infamous crimes unless a grand jury returns an indictment, prohibition against double jeopardy, prohibition against compulsory self-incrimination, due process guarantee); amend. VI (right to speedy and public trial, right to impartial jury trial, right to confront witnesses, right to compulsory process to obtain presence of witnesses at trial, right to assistance of counsel); amend. XIV (application of due process guarantee to States).

[3] *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810, art. 3 (right to life, liberty & security of the person); art. 5 (prohibition against torture or other forms of cruel and unusual punishment); art. 9 (prohibition against arbitrary arrest or exile); art. 11 (guarantee that those charged with offenses will be presumed innocent, receive fair public trials and not be subjected to retroactive laws); art. 12 (safeguards related to the individual's privacy interests).

These recent global developments are not surprising. The potential for tyranny is constant, even in modern societies. Those drafting contemporary constitutional documents need only recall the very recent experience in South Africa to be reminded of the dangers that flow from unchecked police powers. Throughout history, oppressive regimes have used their unlimited police powers to search the homes of political opponents, to detain dissidents without trial, to conduct "show trials" for political purposes, or to subject opponents to torture or other extreme forms of punishment. Limitless police powers take the greatest toll on a society's most vulnerable members: the young, the homeless, the poor, racial or ethnic minorities, and political dissidents. It must be recognized, however, that in modern society, crime is one of the greatest threats to individual safety. If a society is so crime ridden that its members live in a perpetual state of fear, the niceties of constitutional liberty may seem unimportant to the populace. Fear of crime and criminals provokes a demand for government action. In such anxious moments, individual liberty faces its greatest challenge. Justice Brandeis' warning, eloquently expressed almost seventy years ago, still rings true today:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[4]

Perhaps no single issue brings these two competing concerns into greater contrast than the dilemma created when police excesses yield inculpatory evidence against a criminal accused. When evidence has been obtained in contravention of the Constitution, two opposing concerns meet: society's interest in seeing that persons guilty of crime are detected, prosecuted, convicted and punished, and a concurrent societal interest in safeguarding individual liberties against unlawful or unconstitutional police conduct.[5]

---

[4] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

[5] *See* J.B. Dawson, *The Exclusion of Unlawfully Obtained Evidence: A Comparative Study*, 31 INT'L & COMP. L.Q. 513, 513 (1982); G.L. Peiris, *The Admissibility of Evidence Obtained Illegally: A Comparative Analysis*, 13 OTTAWA L. REV. 309, 309 (1981); Meng H. Yeo, *The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches*, 13 MELB. U. L. REV. 31, 36 (1981); Sharon Williams, *Exclusion of Illegally Obtained Evidence: A Comparison of English and American Law*, 57 UMKC L. REV. 315, 316 (1989).

In the United States, these differing principles are presently resolved in favor of individual liberty, through the use of the exclusionary rule.[6] But the status of the American exclusionary rule is anything but "resolved." Since its creation, the rule has led to extensive litigation and a never-ending flow of academic commentary. The debate surrounding the issue has continued unabated in the United States for almost one hundred years. Generally, two opposing viewpoints have emerged, those who want to abolish the exclusionary rule and those who wish to retain it. I will first briefly summarize their respective positions and later analyze each more extensively within this paper.

Opponents of the exclusionary rule argue that this extreme remedy is not required by the Constitution. They claim the rule is merely judicially created, fashioned to protect constitutional rights by deterring future police illegality. Critics complain that the exclusionary rule is not an effective deterrent and exacts a huge toll in lost convictions. According to critics, the rule's costs outweigh its negligible benefits.

---

[6] There are a number of distinct exclusionary rules that have been developed under the Fourth, Fifth and Sixth Amendments. *See* U.S. CONST. amends. IV–VI. Although each rule is somewhat controversial, it is the Fourth Amendment exclusionary rule which has been subjected to unceasing criticism. For this reason, the exclusionary rule under the Fourth Amendment will be the focus of this paper.

With respect to the Fifth Amendment, the "exclusionary rule" is built into the constitutional guarantee; a person may not "be compelled in any criminal case to be a witness against himself." *See id.* amend. V. Any compelled statements are automatically rendered inadmissible. The Supreme Court supplemented the Fifth Amendment with a number of warnings that must be given prior to custodial interrogation. *See* Miranda v. Arizona, 384 U.S. 436 (1966). These warnings were intended as prophylactic measures, thought necessary to dispel the inherently coercive atmosphere of such encounters. If authorities fail to administer these warnings prior to custodial interrogation or if a suspect is interrogated without waiving the rights conferred by these warnings or after asserting any of these prophylactic rights, any statement obtained is excluded. *See id.*; *see, e.g.*, Oregon v. Elstad, 470 U.S. 298 (1985); New York v. Quarles, 467 U.S. 649 (1984); Edwards v. Arizona, 451 U.S. 477 (1981); Brown v. Illinois, 422 U.S. 590 (1975); Michigan v. Tucker, 417 U.S. 433 (1974). But statements obtained in violation of *Miranda*, that are not involuntary, will be admissible for the limited purpose of impeaching a defendant's credibility on cross-examination. *See* Mincey v. Arizona, 437 U.S. 385 (1979). In addition, under both the due process prong of the Fifth Amendment and the Fourteenth Amendment Due Process Clause, a residual discretion exists to exclude evidence that has been obtained by methods that offend "a sense of justice" through conduct that "shocks the conscience." *See* Rochin v. California, 342 U.S. 165 (1952).

Under the Sixth Amendment, the right to the assistance of counsel is only operative after formal adversarial proceedings are commenced. *See* Kirby v. Illinois, 406 U.S. 682 (1972). As a result, a post-indictment identification following a line-up will be inadmissible if counsel was not present, unless the defendant intelligently waived this right. *See* United States v. Wade, 388 U.S. 218 (1967). Similarly, a statement obtained following post-indictment interrogation without counsel will be excluded, unless a valid waiver is demonstrated. *See* Massiah v. United States, 377 U.S. 201 (1964); *see also* Spano v. New York, 360 U.S. 315 (1959); Brewer v. Williams, 430 U.S. 387 (1977).

Therefore, it is invariably argued, the exclusionary rule should be replaced with some more effective and less costly alternative remedy.

In stark contrast, proponents of the exclusionary rule insist that it is mandated by the Constitution and serves as an effective deterrent. They argue that those who criticize its deterrent value fail to recognize that the rule is necessary to preserve judicial integrity and compensate individual victims of police illegality. Proponents complain that the rule's detractors mask a dissatisfaction with substantive constitutional guarantees, under an attack on the exclusionary remedy. If law enforcement obeys the constitutional rules, as they should, then there would be no illegally obtained evidence to be excluded. According to proponents, this remedy is matchless. No other device is equally capable of safeguarding the Constitution's guarantees in a criminal context.

This debate concerning the exclusionary rule has consumed academic literature for the last eighty years. As Justice Cardozo (then Judge) remarked in 1926, "[t]o what [has been] written [about the exclusionary rule], little of value can be added."[7] Throughout the last thirty-five years, the debate has been defined by the Supreme Court's decision in *Mapp v. Ohio*,[8] which first applied the exclusionary rule to the States. But *Mapp* has had the unfortunate effect of making the ensuing debate largely theoretical and speculative. "Now that the exclusionary rule is a constitutional doctrine uniformly applicable throughout the United States there can be no experimenting below this mandated level of due process."[9]

As a result, the contemporary debate has generally focused on whether the automatic exclusionary rule should be retained or abolished and whether some other remedy might be just as effective. The entire debate has been riddled with endless conjecture. Since "*Mapp* was decided, it has not been possible to gather data on the relative effectiveness of alternative methods of deterring [constitutional] violations."[10] It is for this reason that commentators and courts in the

---

[7] People v. Defore, 150 N.E. 585, 587 (1926). Ironically, it was in this very opinion that Judge Cardozo phrased the most often cited criticism of the rule, "[t]he criminal is to go free because the constable has blundered."

[8] 367 U.S. 643 (1961).

[9] Lewis R. Katz, *Reflections on Search and Seizure and Illegally Seized Evidence in Canada and the United States*, 3 CAN-U.S. L.J. 103, 107 (1980); *see also* William R. Baldiga, *Excluding Evidence to Protect Rights: Principles Underlying the Exclusionary Rule in England and the United States*, 6 B.C. INT'L & COMP. L. REV. 133, 134 (1983).

[10] Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1398 (1983).

United States should remain cognizant of what has been occurring in other countries, which may provide guidance on the approach that should be taken in the future.[11]

Part of the difficulty with the American approach is that foreign legal systems are examined infrequently. If such inquiry occurs, it is typically undertaken by critics of the exclusionary rule. These critics are keen to point out that many highly regarded legal systems in other free and democratic countries do not use exclusion,[12] or use it so rarely that its impact on the administration of justice is minimal.[13] In their zeal to make this "compelling" point against the exclusionary rule, some commentators have even misstated the law in other jurisdictions.[14]

Comparing the American experience to that of other democratic nations can prove extremely useful. Comparison with Commonwealth nations is intuitively appealing, given that these countries trace their legal traditions to the English justice system, as does the United States. It must be recalled, however, that each nation has a distinct history, culture, and legal tradition which undoubtedly shapes their approach to improperly or illegally obtained evidence.[15] With the exception of Canada, none of these other nations has imposed constitutional restraints on police powers. Instead, these nations depend upon statutes and the common law to define the scope of police authority.

For comparative purposes, Canada is unlike any other Commonwealth nation. Canada and the United States share close geographic proximity, similar cultures, and a common language. Both nations have ethnically diverse populations forged from immigrant citizens who predominately reside in concentrated urban areas. Both nations have

---

[11] *See* Baldiga, *supra* note 9, at 134.

[12] *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 701–06 (1970).

[13] Barry F. Shanks, Comment, *Comparative Analysis of the Exclusionary Rule and its Alternatives*, 57 TUL. L. REV. 648, 680 (1983).

[14] *See* Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light Of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 60–62 (1994). The authors correctly point out that evidentiary exclusion of unconstitutionally obtained evidence in Canada is governed by section 24(2) of the Canadian *Charter*, but proceed to assert that the governing case is *R. v. Wray*, 11 D.L.R. (3d) 673 (S.C.C. 1970). This decision predated the *Charter* by some eleven years and the position it sets out was expressly abandoned by the Supreme Court of Canada in *Collins v. The Queen* [1987] 1 S.C.R. 265. Curiously, in the footnote for the *Wray* decision the authors omit the year of the decision. *See id.*

[15] *See* Katz, *supra* note 9, at 108.

prospered throughout the post-war era and share similar levels of economic development. Although differences definitely exist, it is arguable that no two nations share so many similarities.[16] It is for these reasons that one commentator noted:

> The Canadian experience on the subject . . . may very well be the best place for United States lawyers to look for an alternative to the exclusionary rule. Justice Felix Frankfurter used to look upon the states as (then) forty-eight laboratories developing their own approaches to criminal justice and the protection of fundamental individual rights. . . . Absent our own ability to practice alternatives to the exclusionary rule, we might logically look to Canada to examine that country's experience in protecting the right of privacy and dealing with unreasonable government intrusions.[17]

These comments are even more compelling in the period since 1982 when Canada, like the United States, elevated constraints on police powers into a constitutional requirement. The Canadian *Charter* includes numerous provisions that draw heavily upon the American Bill of Rights and frequently mirrors rights which American courts have incorporated into the Constitution.[18]

---

[16] The differences that may be noted include: i) the United States cut its ties to Great Britain through revolutionary struggle, while Canada chose a gradual process which was only truly completed in 1982 when the Canadian Constitution was patriated; ii) the American Constitution was drafted in the eighteenth century, while the Canadian *Charter* is a relatively modern constitutional instrument; iii) Canada's population is about one-tenth the size of that of the United States; iv) slavery was never permitted in Canada and, accordingly, the racial tensions that scar American history are not as prevalent in Canada; v) on a per capita basis, Canada has a far lower crime rate than the United States, which may be attributable to more stringent firearms controls and a more expansive social safety net. *See* A.J. Perry, *American Constitutional Jurisprudence as an Interpretive Source for the Charter of Rights and Freedoms*, 3 CROWN C. REV. 4, 4 (1983); Brian Dickson, *Has the Charter "Americanized" Canada's Judiciary? A Summary and Analysis*, 26 U.B.C. L. REV. 195, 200–02 (1992).

[17] Katz, *supra* note 9, at 107.

[18] *See* Canadian *Charter*, *supra* note 1, § 7 ("right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice," similar to the due process guarantee in the U.S. Constitution and art. 3 of the *Universal Declaration of Human Rights*); § 8 ("right to be secure against unreasonable searches or seizures," practically identical to the Fourth Amendment); § 9 ("right not to be arbitrarily detained or imprisoned," similar to art. 9 of the *Universal Declaration of Human Rights*); § 10 (right upon arrest and detention to be promptly informed of the reason, to retain counsel and be informed of that right, similar to *Miranda* warnings and right to counsel conferred by the Sixth Amendment); § 11 (right to speedy trial, right not to be compelled as witness against oneself, right to be presumed innocent, right to reasonable bail, right to public trial by impartial tribunal, right

More specifically, the Canadian *Charter* contains an explicit provision addressing how to deal with unconstitutionally obtained evidence.[19] No such provision appears in the U.S. Bill of Rights. The exclusionary rule in Canada, unlike that of the United States, does not automatically result in exclusion once a constitutional violation is established. Instead, if evidence has been obtained in an unconstitutional manner, a discretionary analysis is triggered to determine its admissibility.

Close analysis of Canadian *Charter* development reveals a fundamental flaw in the traditional exclusionary rule debate in the United States. Early on in the debate's evolution, Justice Holmes observed that the court was faced with two options:

> Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained.[20]

But the Canadian experience reveals that there is a third choice that sits between automatic exclusion and admissibility.[21] Employing a discretionary approach may provoke proponents and opponents of the American exclusionary rule to scoff. Opponents will likely advance the

---

to jury trial where potential punishment exceeds five years, right not to be subjected to retroactive criminal laws, and double jeopardy rights—all of which draw heavily on the Fifth, Sixth and Eighth Amendments, as well as arts. 10 & 11 of the *Universal Declaration of Human Rights*); § 12 ("right not to be subject to cruel and unusual treatment or punishment," drawing on the Eighth Amendment and art. 5 of the *Universal Declaration of Human Rights*).

[19] *See id.* at § 24(2).

[20] Olmstead v. United States, 277 U.S. 438, 470 (1928).

[21] In fairness, some American commentators have advocated a discretionary approach to the exclusion of evidence, but proponents of this position have not made reference to the Canadian experience since the *Charter* was enacted. *See* H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA 70 (1996); Wayne J. Westling, *The Anglo-Australian Rule of Discretionary Exclusion: An Alternative for the United States?*, 31 INT'L. J. OFF. THER. & COMP. CRIMINOLOGY 203 (1987). Only a few American commentators have taken note of Canadian developments after the introduction of the *Charter*. *See* Jerome Atrens, *A Comparison of Canadian and American Constitutional Law Relating to Search and Seizure*, 1 SW. J.L. & TRADE AM. 29, 43–47 (1994); Robert A. Harvie, *The Exclusionary Rule and the Good Faith Doctrine in the United States and Canada: A Comparison*, 14 LOY. L.A. INT'L & COMP. L.J. 779, 795–98 (1992); CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 113 (1993); Donald L. MacDougall, *The Exclusionary Rule and Its Alternatives—Remedies for Constitutional Violations in Canada and the United States*, 76 J. CRIM. L. & CRIMINOLOGY 608 (1985).

same arguments against a discretionary approach that are put forward against an automatic rule. But the Canadian experience prior to the *Charter* reveals that the alternative remedies that critics advocate are ineffective. This is the principal reason that Canada embraced an exclusionary rule in the *Charter*. In contrast, proponents of the automatic exclusionary rule will likely complain that a discretionary remedy would be ineffective in safeguarding constitutional rights. But close analysis of the Canadian experience reveals that a discretionary rule produces numerous benefits over an automatic rule.

There are four main benefits to Canada's discretionary approach to the exclusion of evidence under the *Charter*. First, the rule avoids the unfairness that has spawned much criticism in the United States against the American exclusionary rule. Second, such a rule does not suffer from progressive narrowing of application, a problem which has occurred in the United States, as the deterrent benefits of the rule are determined to be inapplicable in certain situations. Third, the discretionary approach does not foster a judicial reluctance to recognize constitutional violations where they have occurred due to fear that exclusion will automatically follow. Finally, and most importantly, a discretionary rule leads to a more expansive and honest definition of constitutional rights. Courts are not continually preoccupied with the consequences that flow from their interpretation of constitutional guarantees. The interpretation of constitutional rights in Canada is not tainted by an effort to achieve desired results in individual cases.

This article will first consider the approach to illegally obtained evidence employed by England, Scotland, and Australia, in an effort to demonstrate that evidentiary exclusion is necessary for reasons beyond deterring unlawful police behavior, even in nations that do not have entrenched constitutional guarantees. It will then focus on the origins of the exclusionary rule in the United States, including its evolution since the beginning of the twentieth century. The varying rationales underlying the American exclusionary rule will also be examined, as will the ongoing debate that continues to rage in the literature. Finally, the birth of a discretionary exclusionary rule in Canada will be considered, with emphasis placed on the benefits of such an approach.

I. EXCLUSIONARY RULES IN OTHER JURSIDICTIONS

A. *England*

Early English cases reveal dissatisfaction with illegal activities undertaken by law enforcement officials to secure evidence of crime. But despite this discontent, English courts were initially loath to exclude illegally obtained evidence. Instead, English judges, while criticizing improper behavior on the part of the police, would invariably admit evidence relevant to an accused's guilt, no matter how it was obtained.[22] The English position on the effect of police illegality, up until the mid-twentieth century, is appropriately summarized by the following statement contained in an 1861 decision: "It matters not how you get it; if you steal it even, it would be admissible in evidence."[23]

Throughout "the nineteenth and early twentieth centuries, English courts regarded the method of obtaining evidence to be irrelevant to its admissibility."[24] But during the early part of the twentieth century, English courts began developing evidentiary rules that excluded unduly prejudicial evidence. These developments were premised on the need for basic fairness in criminal proceedings. On this basis, rules were crafted to exclude bad character evidence, involuntary admissions, and similar act evidence.[25] It was not until 1955 that the Privy Council employed similar reasoning to unlawfully obtained evidence, holding that such evidence should on occasion be excluded.

In *Kuruma v. R.*,[26] the Privy Council indicated that "[n]o doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused . . . [i]f, for instance, some admission of a piece of evidence . . . had been obtained from a defendant by a trick."[27] In subsequent decisions, the court's discretion to exclude evidence was expanded. Not only would police trickery or misrepresentations to an accused trigger the discretion, but bribery, threats, or other oppressive behavior would have a similar effect.[28]

---

[22] *See* Audrey S. Brent, *Illegally Obtained Evidence: An Historical and Comparative Analysis*, 48 SASK. REV. 1, 2–3 (1983), and cases cited therein.

[23] R. v. Leatham, 8 Cox C.C. 498, 501 (Q.B. 1861).

[24] Baldiga, *supra* note 9, at 135.

[25] *See id.* at 136.

[26] 1955 App. Cas. 197.

[27] *Id.* at 204.

[28] *See* Callis v. Gunn, 1 Q.B. 495, 501 (1964); R. v. Payne, 1 W.L.R. 637, 638 (1963); Jeffrey v. Black, 1 All E.R. 555, 563 (1978).

Although a number of decisions re-affirmed the discretion recognized in *Kuruma*, the pronouncements were typically more theoretical than practical. During the twenty-five year period following *Kuruma*, there are only two reported cases in which English courts chose to exercise their discretion to exclude evidence.[29] In fact, the House of Lords cautioned that although the discretion existed, it was only to be used in rare and exceptional cases.[30] The conflict between principle and practice fueled an adherence to the conventional rule. Evidence still remained admissible in practice no matter how it was obtained.[31]

In the ensuing years, practice had become so divorced from theory that the House of Lords decided to correct this discrepancy. In *R. v. Sang*,[32] the court indicated:

> (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.
>
> (2) Save with regard to admission and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means.[33]

Sang returned English law to the conventional common law position: evidence would not be excluded because of police illegality or impropriety. The decision effectively brought an end to the questions that had lingered following *Kuruma*.[34] Yet, the House of Lords had not spoken unanimously; not all of the Lords were content with the majority's approach.[35]

This dissatisfaction was not restricted to members of the judiciary. In 1981, the Royal Commission on Criminal Procedure released a report calling for sweeping reforms within the English criminal justice system.[36] The Commission recommended substantial revisions to the

---

[29] *See R. v. Court*, 1962 CRIM. L. REV. 697 (1962); *Payne*, 1 W.L.R. 637.

[30] *See Jeffrey*, 1 All E.R. at 559.

[31] *See* Yeo, *supra* note 5, at 33.

[32] 3 W.L.R. 263 (1979).

[33] *Id.* at 272.

[34] The *Sang* holding was re-affirmed in R. v. Adams, 3 W.L.R. 275, 283 (C.A. 1980) and in Morris v. Beardmore, 3 W.L.R. 283, 287 (H.L. 1980).

[35] Three members of the House of Lords were prepared to recognize a broader discretion to refuse the admission of illegally obtained evidence.

[36] *See* Baldiga, *supra* note 9, at 147–60. The author details the findings and recommendations contained in the Commission's Report. *See id.*

scope of the "exclusionary rule" and noted the importance of society's interest in having all evidence admitted that might assist in securing a conviction. Against this pressing concern the Commission identified two competing principles that weighed in favor of exclusion. First, the Commission recognized that exclusion is necessary to prevent the government from securing an improper advantage over the accused. Second, the Commission noted that exclusion is necessary where illegally obtained evidence, such as a coerced confession, is of questionable reliability and where the defendant's admission compromises the fairness of the trial.[37]

In striking a balance between these competing considerations, the Commission advocated that exclusion occur whenever the government has violated a right traditionally and emphatically protected by English law. In circumstances where the illegality involves a procedural defect of a technical nature, the Commission suggested that the evidence obtained should be admitted.[38] The Commission's recommendations formed the basis for a complete legislative overhaul of the English system of criminal procedure, including the exclusionary rule. In 1984, in the wake of the Commission's Report, Parliament introduced The Police and Criminal Evidence Act (PACE).[39] The Act includes a provision dealing explicitly with evidentiary exclusion. Section 78 states that evidence may be excluded "if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the trial that the court ought not to admit it."

The recognition of an exclusionary rule by Parliament served as a long-awaited catalyst, prompting English courts to employ evidentiary exclusion in circumstances where police violated fundamental provisions of PACE. Since the Act was introduced, English courts have regularly excluded statements and physical evidence where the requirements of the Act have been ignored by the police.[40] In explaining the transformation of the English judiciary since PACE, an English commentator indicated that it "seems to reflect a growing disillusionment with police pretensions to professionalism and self-regulatory capacity . . . a renewed judicial commitment to rule of law principles

---

[37] *Id.* at 149–50.

[38] *Id.* at 152–53.

[39] Police and Criminal Evidence Act, 1985 (Eng.) [hereinafter PACE].

[40] *See* BRADLEY, *supra* note 21, at 106–08 and the numerous cases cited therein.

and the ideal of legal accountability for the exercise of police powers, and the failure of other forms of legal control over the police."[41]

Three points about the English experience are important to bear in mind. First, deterrence of future illegality by the police is not the principal motivation underlying these developments. Instead, the impetus for the exclusionary rule would appear to be dissatisfaction with allowing the government to secure an advantage from its own illegality, concern with respect to the effect of unreliable evidence on the fairness of an accused's trial, and dissatisfaction with alternative methods for disciplining the police.[42] Undoubtedly, deterrence of future impropriety is a hoped for by-product of exclusion, but it is not the driving force.

Secondly, English courts exclude evidence if it was obtained in violation of a statute. PACE, like all other Acts of Parliament, does not have constitutional status in England. The statute is not England's "supreme law," but nonetheless, exclusion has been utilized to enforce its edicts.

Finally, and most importantly, England has specifically rejected an automatic exclusionary rule in favor of a discretionary approach. In embracing this middle ground, England cited the injustice that would result if the inadvertent violation of technical procedural rules automatically led to exclusion. In such circumstances, the British have chosen to emphasize societal interests over those of the individual accused.[43]

B. *Scotland*

Scottish courts have long recognized the need for an exclusionary rule. In the leading case on evidentiary exclusion, *Lawrie v. Muir*,[44] the

[41] *Id.* at 105, where the author quotes David Feldman, *Regulating Treatment of Suspect in Police Stations: Judicial Interpretation of Detention Provision in the Police and Criminal Act 1984*, 1990 CRIM. L. REV. 452 (1990).

[42] It is important to note that since 1976, the English have had an external police disciplinary procedure in place. *See* Dawson, *supra* note 5, at 544–46; Williams, *supra* note 5, at 327–29 (for explanations of the police complaint procedures in the United Kingdom and the extensive problems inherent in this approach). All complaints against the police are channeled through the Police Complaints Board. *See* Dawson, *supra* note 5, at 544–46; Williams, *supra* note 5, at 327–29. The Board, which consists of nine members, none of whom has previously served with the police, has the power to convene hearings and discipline officers. *See* Dawson, *supra* note 5, at 544–46; Williams, *supra* note 5, at 327–29. In addition, where the Board feels that criminal charges might be warranted, complaints may be forwarded to the Director of Public Prosecutions. *See* Dawson, *supra* note 5, at 544–46; Williams, *supra* note 5, at 327–29.

[43] *See* Baldiga, *supra* note 9, at 153.

[44] Lawrie v. Muir, 1950 S.L.T. 37, 39–40 (H.C.J.).

Scottish High Court acknowledged that the law must attempt to reconcile two competing considerations: the public interest in the admissibility of all evidence bearing on an accused's guilt and the competing interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities. The Court recognized that neither interest should dominate the other.[45] Illegally or irregularly obtained evidence, however, is generally inadmissible unless the illegality or irregularity associated with its procurement can be excused by the court.[46]

The Court in *Lawrie* provided limited guidance on what factors should lead courts to excuse illegality or irregularity. The Court indicated:

> [T]he question [is] one of circumstances. . . . It would greatly facilitate the task of judges were it possible to imprison the principle within the framework of a simple and unqualified maxim, but I do not think that it is feasible to do so. . . . Irregularities require to be excused, and infringements of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed.[47]

The court concluded that the evidence obtained through an unlawful search of the accused's business had to be excluded and rejected the officers' claim that they had acted in good faith.

A number of subsequent Scottish decisions have refined the discretion to exclude evidence, delineating the types of circumstances that may excuse official illegality. The intention of the authorities has played a major role in this determination. If the officials deliberately deprive an individual of his rights, it is unlikely that the court will excuse the illegality.[48] The reason for taking such a strict approach to deliberate lawlessness is twofold. First, to do otherwise would nullify the liberties of the individual citizen and cause the authorities to

---

[45] *See id.* at 39.

[46] SHERIFF MACPHAIL, LAW OF EVIDENCE IN SCOTLAND, para. 21.01 (1979).

[47] *Lawrie*, 1950 S.L.T. at 39–40.

[48] *See* M'Govern v. H.M. Advocate, 1950 S.L.T. 133, 135 (H.C.J.) (results from fingernail scrapings taken from accused were excluded, there was no lawful basis to take the scrapings and the intentional conduct of the police constituted an assault); H.M. Advocate v. Turnbull, 1951 S.L.T. 409 (H.C.J.) (files held inadmissible because court found officers deliberately seized files in addition to those authorized in the warrant).

employ unlawful investigative techniques. Second, admitting evidence deliberately obtained through unlawful means threatens the fairness of an accused's trial by permitting the state to obtain a tactical advantage on the back of the accused's civil liberties.[49]

In contrast, if the illegality was inadvertent, Scottish courts normally admit the evidence obtained.[50] Similarly, illegality has been excused when the authorities have acted in exigent circumstances where strict compliance with the law gives rise to a reasonable fear that the evidence may be destroyed or moved.[51] Like the English experience, there are a number of important lessons to be derived from the Scottish approach to illegally obtained evidence.

First, although deterrence is a major factor, it is not the sole rationale for the Scottish exclusionary rule. Instead, Scottish courts choose to emphasize fairness to the aggrieved party. If the authorities are permitted to use illegally obtained evidence at trial, and thereby obtain an advantage over the accused by violating his legal rights, the fairness of the accused's trial is markedly diminished.

Second, Scottish courts, like their English counterparts, have determined that the power to exclude evidence is necessary when authorities violate regular laws. Exclusion is not employed in response to constitutional violations, as there are no entrenched individual constitutional rights in Scotland. Violations of regular laws are sufficient to warrant exclusion of evidence.

Third, the Scottish have rejected the automatic exclusionary rule as well. Although a presumption in favor of exclusion arises from police illegality or impropriety in procuring evidence, this presumption may be displaced after weighing all the circumstances. This approach recognizes that the interest of society may occasionally predominate over those of the individual.

C. *Australia*

Australia's Constitution deals primarily with the division of powers between the various States and the Federal Government. It resembles the older Canadian format prior to the *Charter*. Restraints on police investigatory powers in Australia may be found in State statutes and in

---

[49] *See Turnbull*, 1951 S.L.T. at 411–12.

[50] *See* Fairley v. London Fishmongers, 1951 S.L.T. 54, 58 (H.C.J.).

[51] *See* Hay v. H.M. Advocate, 1968 S.L.T. 334 (H.C.J.); H.M. Advocate v. McKay, 1961 S.L.T. 174 (H.C.J. Scot.); H.M. Advocate v. Hepper, 1958 S.L.T. 160 (H.C.J.).

the common law.[52] Throughout most of its history, Australia followed the example of English courts concerning the issue of illegally obtained evidence. Until 1978, the English approach governed; although a trial judge had discretion to exclude unlawfully obtained evidence, he could only do so if its admission would result in unfairness.

In *Bunning v. Cross*,[53] the Australian High Court broke away from the traditional English approach. The Court concluded that not only does a trial judge have discretion to exclude evidence which is more prejudicial than probative, but that this discretion extends to otherwise admissible evidence that was illegally or otherwise improperly obtained by the police. The Court did not justify this discretion based on fairness to the individual accused or the need to discipline police. Instead, it based its decision on "broader questions of high public policy."[54] In justifying the discretion to exclude, the Court expressed its concern that by admitting illegally obtained evidence it may appear to be condoning or encouraging unlawful police behavior.[55] Therefore, according to the Court, evidentiary exclusion was required to protect the rights of individual citizens. Society's interest in safeguarding individual rights required such discretion to ensure that, "a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired."[56] In arriving at this conclusion, the Court noted that "truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."[57] The existence of alternative methods for coping with police illegality, such as disciplinary, criminal or civil proceedings, did not foreclose the Australian High Court from recognizing a discretion to exclude evidence. Despite the existence of other remedies, the power to exclude evidence is necessary because otherwise courts would be required to tolerate police illegality. "[T]oleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable however desirable might be the immediate end in view, that of convicting the guilty."[58]

---

[52] *See* PETER SALLMAN & JOHN WILLIS, CRIMINAL JUSTICE IN AUSTRALIA, ch. 20 (1984).

[53] 19 A.L.R. 641 (H.C. 1978).

[54] *Id.* at 659.

[55] *Id.*

[56] *Id.* at 661.

[57] *Id.* at 657, *quoting* Knight Bruce V.C. in Pearse v. Pearse (1846) 63 E.R. 950, 957 (U.K.).

[58] *Id.* at 661.

Against the power to exclude illegally obtained evidence to protect individual rights, the Court directed that the public interest in the conviction of the guilty must be considered and weighed.[59] In favoring a discretionary approach over an automatic rule, the Court emphasized the need to maintain respect for the law. "This [respect] can be as much damaged by the exclusion of evidence because of some minor illegality as by over-ready reception of illegally-obtained evidence."[60] As a result, the Court enumerated a number of factors to be considered: (i) whether the law was deliberately or recklessly violated or whether the illegality was unintended or accidental; (ii) whether the illegality affected the reliability of the evidence, although this is less important in the face of deliberate illegality; (iii) the ease of compliance with the law; (iv) the nature of the offense charged; (v) whether statutory procedures specifically intended to limit the powers of the police were violated; (vi) the urgency of protecting perishable evidence; and (vii) the availability of alternative, equally cogent, evidence.[61]

Although the High Court had clearly recognized discretion to exclude illegally or improperly obtained evidence in *Bunning*, this power remained stagnant for twelve years. Arguably this is due to the actual disposition in *Bunning*. After applying the balancing test it had articulated, the Court refrained from excluding the illegally obtained evidence at issue. This situation changed in 1990 when the Australian High Court employed the discretion articulated in *Bunning* to exclude evidence discovered in a search conducted pursuant to a defective warrant.[62] A search warrant, based on conclusory statements in an affidavit that reasonable grounds for suspicion existed, had been obtained without setting out any grounds to support that conclusion, as required by the governing statute. "It seems likely that this holding, and particularly its repeated insistence that the terms of the statute must be followed, will lead trial judges to be substantially more receptive to the possibility of (discretionary) evidentiary exclusion in future cases involving illegal searches."[63]

Four important points regarding the Australian approach must be remembered. First, the rationale chosen to justify the rule is significant.

---

[59] *See id.* at 657.

[60] Rosemary Pattenden, *The Exclusion of Unfairly Obtained Evidence In England, Canada, and Australia*, 29 INT'L & COMP. L.Q. 664, 674 (1980).

[61] *See* Bunning v. Cross, 19 A.L.R. 641, 661–63 (H.C. 1978).

[62] *See* George v. Rockett, 64 A.L.J.R. 384 (H.C. 1990).

[63] BRADLEY, *supra* note 21, at 110.

The rule is not premised exclusively on deterrence of future police illegality. Instead, the Australian High Court emphasized that automatically admitting illegally obtained evidence would be tantamount to a tacit condonation of unlawful and improper police practices. Exclusion is necessary to safeguard individual liberties by avoiding judicial condonation of illegal police practices.

Second, alternative remedies were deemed unsatisfactory. If the court refrained from employing exclusion, then the remedy for the violation of individual rights would be left with the executive. This result was unacceptable to the court, which refused to be relegated to the role of spectator in the process of safeguarding individual liberty.

Third, in a manner similar to England, the Australians have recognized a power to exclude evidence where police practices violate statutory or common law liberties. Violations of constitutional rights do not trigger exclusion; it is violations of regular laws by officials that demand an exclusionary remedy.

Finally, like the English, the Australians have rejected an automatic exclusionary rule in favor of a discretionary approach. This position recognizes that where an offense is serious and the illegality is technical or minor, the public interest should predominate over the interests of individual liberty.

II. BIRTH OF THE AMERICAN EXCLUSIONARY RULE AND ITS RATIONALE(S)

Unlike most of the Commonwealth nations, including the three considered above, the United States has long had a Constitution which delineates specific individual rights and incorporates express limitations on the investigatory powers of the police. Although the original Constitution, drafted in 1787, did not address individual rights, this deficiency was soon cured by the inclusion of a Bill of Rights in 1791.[64] But the Bill of Rights suffered from one major shortcoming, as Professor Henkin explains:

> While the Bill of Rights confirms that individual rights are not to be abridged by government, the framers did not deem it necessary or proper to say *how* these rights were to be

[64] U.S. CONST. amends. I–X.

> secured against such violation, or what remedies should be provided to anyone whose rights had been violated.[65]

One might infer that the Framers believed that the system of limited government, coupled with a number of checks and balances, would safeguard individual rights by preventing a concentration of power. This structure, along with the ability to replace elected representatives, was viewed as sufficient to protect the interests of individual liberty.[66] Judicial review of government actions did not become a firmly entrenched principle of American constitutional law until *Marbury v. Madison*[67] was decided in the beginning of the nineteenth century. In this decision, Justice Marshall established the concept of judicial review and transformed the courts into what they are today, "the rock and the redeemer of our rights."[68]

In a criminal law context, however, it would be another hundred years before American courts would draw a connection between redeeming constitutional rights and the exclusion of unconstitutionally obtained evidence. Historically, the American approach to unconstitutionally obtained evidence was similar to the English approach to illegally obtained evidence. Unconstitutional behavior was not viewed as a sufficient reason to exclude evidence that was pertinent to the issue of guilt. If items were offered into evidence, the court could not take notice of how they were obtained or form a collateral issue to determine the question. The sole issue for the court was whether the evidence tendered was relevant.[69]

The United States Supreme Court introduced the exclusionary rule to American law through its 1914 decision in *Weeks v. United States*.[70]

---

[65] Louis Henkin, *International Human Rights and Rights in the United States, in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 25, 36 (Theodor Meron ed., 1984).

[66] *Id.*

[67] 5 U.S. (1 Cranch) 137 (1803).

[68] LOUIS HENKIN, THE AGE OF RIGHTS 90 (1990).

[69] *See* Adams v. New York, 192 U.S. 585, 578–89 (1904). It is important to note that the *Adams* decision was pre-dated by *Boyd v. United States*, 116 U.S. 616 (1886). In *Boyd*, the Supreme Court had overturned a forfeiture order made against the Boyds, in circumstances where they were compelled to produce evidence which proved pivotal to the government's case. *See Boyd*, 116 U.S. at 622, 633–35. The Supreme Court concluded that the document in question was obtained in a manner that violated the Fourth Amendment. The Court equated the mandatory production of personal papers to be tantamount to the self-incrimination prohibited by the Fifth Amendment. On this basis, the document should not have been permitted in evidence. This decision planted the seeds for subsequent developments of an exclusionary rule under the Fourth Amendment alone. *See id.*

[70] 232 U.S. 383 (1914).

A U.S. Marshal, on the heels of an earlier unlawful search by State authorities, entered the Weeks' home and conducted a search. The Marshal did not have a warrant and was not acting with any legal authority. In reversing Weeks' conviction, the Court concluded that the search violated the Fourth Amendment and that the defendant's pre-trial motion for the return of property seized should have been granted. Earlier cases that had rejected evidentiary exclusion, as a constitutional remedy, were distinguished based on the timing of the defendant's motion to exclude. In *Weeks,* a pre-trial motion had been brought and the defendant had not attempted to raise a "collateral issue" in the midst of trial.

In rationalizing the exclusion of evidence, the Court indicated that the Fourth Amendment was intended to place clear limitations and restraints on the exercise of power by the courts and federal officials. The duty to give effect to the Amendment was obligatory and fell to those entrusted with the enforcement of law. Violations of constitutional rights "should find no sanction in the judgements of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."[71] To admit such evidence, the Court concluded, would be tantamount to sanctioning open defiance of the Constitution by law enforcement officials.[72] The Court refused to perform such a function, as this would be inconsistent with its obligation to give effect to the Fourth Amendment.

Unfortunately, the Court in *Weeks* did not explicitly identify the rationale underlying the exclusionary rule it had created.[73] It is readily apparent that deterrence of future unconstitutional behavior was not an expressed motivation for the rule. Yet, despite the lack of clarity, two bases for the decision can be discerned. The first is the notion that the Fourth Amendment itself precludes the court from admitting the evidence. Without exclusion, the Fourth Amendment would have no value and "might as well be stricken from the Constitution."[74] The second is the view expressed by the court that admitting the evidence would be equal to sanctioning the violation of the Constitution. This latter consideration was undoubtedly linked to a more general concern

---

[71] *Id.* at 392.

[72] *See id.* at 394.

[73] *See* UVILLER, *supra* note 21, at 65.

[74] *Weeks,* 232 U.S. at 393.

regarding the integrity of the courts and the perception that would be created if the evidence were admitted.

Theoretically, *Weeks* was a significant decision, with its introduction of an exclusionary rule to American law. From a practical standpoint, however, the decision only affected federal prosecutions.[75] The Fourth Amendment was not yet applicable to the States.[76] But the Fourteenth Amendment loomed in the background and by the 1930s was a firmly entrenched mechanism for making provisions in the Bill of Rights applicable to the States.[77] This is exactly what occurred in relation to the Fourth Amendment in 1949.

In *Wolf v. Colorado*,[78] the Supreme Court concluded that the Fourth Amendment's guarantee was essential to any free society and implicit in the concept of ordered liberty. The Fourth Amendment was first made applicable to the States through this decision, but the Court refrained from making the exclusionary rule mandatory in State proceedings. The rule "was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution . . . [it was] a matter of judicial implication."[79] The Court emphasized that other English speaking nations had rejected the rule, as had thirty-one of the forty-seven States which had considered it. In the States which rejected the rule, other remedies existed, including damages, criminal prosecutions, internal police discipline, and contempt proceedings.[80] In light of the varied State approaches, evidentiary exclusion was not viewed as an essential ingredient of the Fourth Amendment, therefore the Due Process Clause did not mandate its application to the States.[81]

---

[75] *See* Katz, *supra* note 9, at 115.

[76] *See* Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855) (holding that the Fourth Amendment does not apply to the States, given that the Bill of Rights only applied as a restriction on federal powers, *citing* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)).

[77] *See* Powell v. Alabama, 287 U.S. 45, 65–68 (1932), *employing* Hurtado v. California, 110 U.S. 516 (1884). The Sixth Amendment right to counsel was a fundamental provision in the Bill of Rights and was incorporated within the Due Process Clause, making it applicable to the States. Some members of the Supreme Court would have taken a more progressive approach, holding that the Due Process Clause made the entirety of the Bill of Rights applicable to the States. *See* Adamson v. California, 332 U.S. 46, 174–75 (1947) (Black, J., dissenting), but this position has never won over a majority of the Court.

[78] 338 U.S. 25, 27–28 (1949).

[79] *Id.* at 28.

[80] *See id.* at 29–31.

[81] Three dissenters held that the exclusionary rule must be applied to the States: Justice Rutledge wrote that without the exclusionary rule the Fourth Amendment might as well be stricken from the Constitution; Justice Murphy wrote that alternative remedies were ineffective

The *Wolf* decision appeared to clarify the rationale underlying the federal exclusionary rule. The rule reflected one of several possible and permissible options for remedying Fourth Amendment violations. The rule was not mandated by the Fourth Amendment. *Weeks* should not be read as though the exclusionary rule was required by the Constitution. The rule amounted to a judicially created remedy, nothing more. But in the period following *Wolf*, the Supreme Court appeared uneasy with the notion that Federal courts could never review State decisions admitting evidence obtained in violation of the Fourth Amendment.[82]

In *Rochin v. California*,[83] the Court was confronted with a search by state officials which had undoubtedly violated the defendant's Fourth Amendment rights. Police, without legal justification, burst into Rochin's bedroom, used force in an effort to prevent him from swallowing some capsules, and when unsuccessful, forcibly had his stomach pumped at the hospital. The Court ruled that the evidence derived from this process should have been excluded, not under the Fourth Amendment, but pursuant to the Due Process Clause. Due process, the Court held, required that evidence be excluded if obtained in a manner that shocks the conscience, offends a sense of justice, or runs counter to the decencies of civilized conduct.[84]

Unfortunately, *Rochin* set an ambiguous standard for federal review, which created difficulty in subsequent application. The decision fueled a series of conflicting decisions and caused confusion concerning the federal court's residual power to exclude evidence under the Due Process Clause.[85] This discretionary approach lacked clear criteria necessary to ensure consistency in application.[86] The process of grappling with an unruly standard for federal review appears to have provided the impetus to reconsider *Wolf*.

In *Mapp v. Ohio*,[87] the Supreme Court, without any prompting from Mapp's counsel, overturned its decision in *Wolf*.[88] The Court held that

---

and only the exclusionary rule would deter violations of the Fourth Amendment; and Justice Douglas wrote that the rule must be applied otherwise there would be no effective sanction. *See id.* at 40–48.

[82] *See* Brent, *supra* note 22, at 21.

[83] 342 U.S. 165 (1952).

[84] *See id.* at 172–73.

[85] *See, e.g.*, Breithaupt v. Abram, 352 U.S. 432 (1957); Irvine v. California, 347 U.S. 128 (1953); Walder v. United States, 347 U.S. 63 (1953).

[86] Brent, *supra* note 22, at 22.

[87] 367 U.S. 643 (1961).

[88] *See id.* at 646 n.3. Mapp's counsel did not argue the case on the basis that *Wolf* should be

the exclusionary rule was applicable to the States. In distinguishing *Wolf,* the Court reasoned that the decision was bottomed on the factual circumstances which had since changed. First, in the ensuing period, more than half of the States which had considered the exclusionary rule chose to wholly or partly adopt it. Second, citing the experience in California and other States, the Court concluded that alternative remedies had proven ineffective.[89]

In his decision, Justice Clark echoed what had been stated a year earlier in *Elkins v. United States.*[90] The purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[91] The Court, however, still had to rationalize its conclusion, insisting that the exclusionary rule was an essential part of both the Fourth and Fourteenth Amendments.[92] In explaining this conclusion, Justice Clark acknowledged other justifications for the exclusionary rule beyond deterrence.

First, Justice Clark indicated that an opposite holding would reduce the Fourth Amendment to a "form of words." He claimed that this would be the equivalent of granting a right, while in reality withholding its privilege and enjoyment.[93] On this view, the exclusionary rule had its foundation in the Constitution. Second, Justice Clark reasoned that a contrary holding would invite State officials to violate the Constitution.[94] The language used appears to repeat the deterrence rationale, exclusion is needed as a disincentive to future unconstitutional behavior. Finally, the integrity of both the judiciary and the government were cited to justify the rule. With respect to the judiciary, Justice Clark indicated that convictions through unconstitutionally obtained evidence should find no sanction in the judgments of the Court.[95] The reason was, as explained by a later quote from *Elkins,* "the imperative

---

overturned, instead he focused on the constitutionality of the offense with which Mapp was charged. Only the American Civil Liberties Union, in its amicus brief, requested that *Wolf* be overturned. *See id.*

[89] *See id.* at 651–54.

[90] 364 U.S. 206 (1960). The Court overturned the "silver platter" doctrine. The doctrine had permitted State officials who violated the Constitution in a State investigation to turn over evidence of federal crimes so obtained to federal authorities. The latter were then permitted to use the evidence in a federal prosecution. *See id.*

[91] *Mapp,* 367 U.S. at 656, *quoting Elkins,* 364 U.S. at 217.

[92] *See id.* at 656–57.

[93] *See id.* at 655–56.

[94] *See id.* at 658.

[95] *See id.* at 648, citing Weeks v. United States, 232 U.S. 383, 392 (1914).

of judicial integrity."[96] In discussing the concept of governmental integrity, Justice Clark cautioned,

> [n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. . . . "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[97]

The varied rationales offered for the rule by Justice Clark were not concurred with by a majority of the Justices.[98] In this fashion, the decision repeated a trend which had marked the early decisions that gave birth to the exclusionary rule. "In fact, no decision by the Court has ever fully explored the possible alternative doctrinal bases for the rule, and the justifications for the rule seem to have changed subtly over time-usually without any explicit recognition by the Justices involved."[99]

A review of the seminal decisions giving rise to the exclusionary rule reveals varying theories justifying its use. The theories fall into three general categories: (1) exclusion is directly mandated by the Constitution; (2) exclusion is necessary to preserve the integrity of the judiciary or the government; and (3) exclusion is a constitutionally required remedy, necessary for the purpose of deterring future constitutional violations.[100]

---

[96] Mapp v. Ohio, 367 U.S. 643, 659–60 (1961), *quoting Elkins*, 364 U.S. at 222.

[97] *Id.* at 659, *quoting* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[98] Justices Black & Douglas concurred in the result, but offered differing reasons which did not embrace all of Clark's reasons. *See id.* at 660, 666. Justice Harlan, joined by Justices Frankfurter and Whittaker, dissented. *See id.* at 672.

[99] Stewart, *supra* note 10, at 1372.

[100] *See id.* at 1380. The author outlines the various decisions, or portions of decisions, that support each rationale. *See id.* at 1380–84. Cases supporting the proposition that exclusion is mandated by the Constitution include: *Mapp*, 367 U.S. at 651, 655–57; *Olmstead*, 277 U.S. at 462–63; Agnello v. United States, 269 U.S. 20, 33–35 (1925); Gouled v. United States, 255 U.S. 298, 313 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); *Weeks*, 232 U.S. at 391–93. Cases supporting the proposition that exclusion is mandated to preserve the integrity of the court or the government include: *Mapp*, 367 U.S. at 659–60; *Elkins*, 364 U.S. at 222; and *Olmstead*, 277 U.S. at 469–71. Cases supporting the proposition that exclusion is a constitutionally required remedy necessary to deter future constitutional violations include: *Mapp*, 367 U.S. at 648; *Elkins*, 364 U.S. at 217.

Determining a definitive rationale for the exclusionary rule has not proven possible. Given that varied reasons have been offered to justify the rule, both in the United States and in other jurisdictions, focusing on a single rationale seems overly simplistic. Remarkably, in the wake of *Mapp,* a number of decisions identified deterrence as the sole rationale underlying the rule and either discounted or ignored other equally compelling justifications. The genesis of this development

> comes from a few cases decided during the 1960s involving the vexing question of retroactivity. . . . In *Linkletter v. Walker,* the Court declared that the purpose of the exclusionary rule was to deter and refused to make the *Mapp* doctrine retroactive on the basis that to do so would not have a deterrent effect.[101]

The deterrence rationale for the exclusionary rule gained increasing preeminence during the era of the Burger Court.

Prior to being appointed to the Supreme Court, Warren Burger was one of the most vocal critics of the Warren Court's criminal procedure revolution.[102] Therefore, it is not surprising that once appointed he became the most ardent judicial opponent of the exclusionary rule, calling for the rule's abolition in *Bivens v. Six Unknown Agents.*[103] What is surprising is the Chief Justice's assertion in *Bivens* that "[i]t is clear . . . the exclusionary rule has rested on the deterrent rationale."[104] This claim is astonishing because seven years earlier the Chief Justice had written that, "[t]he *Weeks* holding . . . rested on the Court's unwillingness to give even tacit approval to official defiance of constitutional provisions by admitting evidence secured in violation of the Constitution. The idea of deterrence may be lurking between the lines of the opinion but [it] is not expressed."[105]

The gradual march towards transforming deterrence into the sole rationale for the exclusionary rule culminated in *United States v. Calandra.*[106] A majority of the Court adopted the position that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect,

---

[101] Steven Cann & Bob Egbert, *The Exclusionary Rule: Its Necessity in Constitutional Democracy,* 23 How. L.J. 299, 305 (1980); *see also* Linkletter v. Walker, 381 U.S. 618, 636–37 (1965).

[102] LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 195 (1983).

[103] 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

[104] *Id.* at 415.

[105] Warren Burger, *Who Will Watch The Watchman,* 14 AM. U. L. REV. 1, 5 (1964).

[106] 414 U.S. 338 (1974).

rather than a personal constitutional right of the party aggrieved."[107] Since deciding *Calandra,* the Supreme Court has consistently reiterated that deterrence is the "primary justification for the exclusionary rule."[108] While transforming deterrence into the principle justification for the rule, the Court simultaneously employed this limited rationale to narrow the scope of the rule's applicability. In *Calandra,* the Court explicitly acknowledged a cost-benefit analysis applicable in determining whether the exclusionary rule should be applied.[109] If deterrence was the rule's purpose, then the trial court should weigh the cost of excluding evidence from a particular proceeding against the incremental deterrent benefit achieved from exclusion. If the court determined that the cost outweighed the benefit, the rule should not be applied.[110]

After applying the cost-benefit analysis in *Calandra,* the Court determined that the exclusionary rule should not preclude the use of unconstitutionally obtained evidence in grand jury proceedings. Deterrence was sufficiently advanced by excluding such evidence at trial; no additional deterrent benefit was derived from preventing the grand jury from hearing the evidence. Since *Calandra* was decided, the cost-benefit analysis has consistently been used in a variety of circumstances to either narrow the scope of the exclusionary rule or to refuse its extension.[111]

---

[107] *Id.* at 348.

[108] Stone v. Powell, 428 U.S. 465, 486 (1976); *see also* Brown v. Illinois, 422 U.S. 590, 599–600 (1975) ("The rule is calculated to prevent not to repair. Its purpose is to deter."), *citing Elkins,* 364 U.S. at 217; Michigan v. Tucker, 417 U.S. 433, 447 (1974) ("the deterrent purpose of the exclusionary rule").

[109] This approach was implicit in Alderman v. United States, 394 U.S. 165, 174–75 (1969). Justice White, delivering the majority opinion, suggested that the applicability of the exclusionary rule would turn on a balancing of the costs and benefits of exclusion. *See id.*

[110] *See Calandra,* 414 U.S. at 349.

[111] *See, e.g.,* Arizona v. Evans, 115 S.Ct. 1185, 1193–94 (1995) (the exclusionary rule was not applied where a police officer, relying on an erroneous computer entry, arrested the defendant on an outstanding warrant—due to a clerical error by court staff an arrest warrant that had been revoked remained registered in the computer system, there would be no deterrent benefit in applying the rule as exclusion would not deter future clerical errors by court staff who are not adjuncts to law enforcement); Illinois v. Krull, 480 U.S. 340, 349–55 (1987) (the exclusionary rule should not be applied when police have relied on a statute that they did not know to be unconstitutional, as there is no deterrent benefit to be derived when police act in good faith reliance on a law they have no reason to believe is unconstitutional); Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032, 1040–50 (1984) (the exclusionary rule does not apply to deportation proceedings, the court concluded that the deterrent benefit of excluding the evidence would be outweighed by its costs—immigration officials would not be deterred given the unlikelihood of deportees raising exclusionary rule claims); United States v. Leon, 468 U.S.

In focusing on the deterrent aspect of the exclusionary rule and emphasizing the cost-benefit analysis, the Burger Court effectively narrowed the thrust of the rule.[112] Although the court has managed to shift the rule's focus to deterrence, it has been unable to convincingly explain these developments in light of earlier pronouncements emphasizing judicial integrity. For instance, in *Terry v. Ohio*,[113] after noting the deterrent benefits of the rule, the Supreme Court proceeded to emphasize the judicial integrity rationale in the strongest of terms, indicating:

> The rule also serves another vital function—"the imperative of judicial integrity". . . . Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.[114]

897, 919–22 (1984) (the exclusionary rule should no longer be applied where police officers acted in good faith, pursuant to a deficient search warrant; the reason, the magistrates who sign the warrants are responsible for any errors and they will not be deterred by the exclusion of evidence); United States v. Havens, 446 U.S. 620, 627–28 (1980) (unconstitutionally obtained evidence could be used to impeach the credibility of the victim of an unlawful search, as the deterrent benefit of the exclusionary rule was sufficiently served by excluding the evidence from the prosecution's case in chief); *Stone*, 428 U.S. at 474–95 (state prisoners may not seek *habeas* review in Federal courts on the ground that unconstitutionally obtained evidence had been introduced at trial, as no additional deterrent benefit is achieved where the issue has already been fully litigated in State courts); United States v. Janis, 428 U.S. 433, 457–58 (1976) (refusing to apply rule in federal tax proceedings to evidence unconstitutionally seized by state police officer, deterrent purpose would not be served as unlikely that officer would have foreseen this potential use of the evidence); United States v. Peltier, 422 U.S. 531, 542 (1975) (refusing to give retroactive application to earlier Fourth Amendment decision, based on conclusion that doing so would not have a deterrent benefit); United States v. Tejada, 956 F.2d 1256, 1260–63 (2d Cir. 1992) (exclusionary rule inapplicable at sentencing hearings, the benefit of providing sentencing judges with full information outweighed the likelihood that admission would encourage unlawful police conduct).

[112] Yale Kamisar, *The "Police Practice" Phase of the Criminal Process and the Three Phases of the Burger Court*, *in* THE BURGER YEARS 143, 161–63 (H. Schwartz ed., 1987).

[113] 392 U.S. 1 (1968).

[114] *Id.* at 12–13.

The Supreme Court has made an ineffective attempt to explain the increased emphasis on deterrence, and discount the importance of judicial integrity. The Court's claim that judicial integrity "has limited force as a justification for the exclusion of highly probative evidence" is not convincing.[115] This is particularly so in light of the emphasis placed on judicial integrity in earlier decisions such as *Terry*, and the fact that deterrence does not exclusively ground the exclusionary rule in other democratic nations, like England, Scotland or Australia.[116] "It is difficult to resist the conclusion that, like a pack of hungry wolves, Supreme Court Justices, unconvinced of the merits of exclusion, separated the most vulnerable rationale from the herd of rationales for the purpose of savaging it."[117] This view has even been shared by some American jurists, who have questioned the real motivation underlying the Supreme Court's increased emphasis on deterrence.[118]

In reducing the purpose of the rule down to a question of deterrence, the Supreme Court has effectively redefined the debate surrounding the exclusionary rule. The present debate focuses around "the precise constitutional status of the exclusionary rule and, in particular, whether Congress could place significant limitations upon the rule or even abolish it entirely by providing some other remedy in its place."[119] It is to this debate which we now turn.

III. THE CONTEMPORARY AMERICAN EXCLUSIONARY RULE DEBATE

The debate surrounding the exclusionary rule has been ongoing in the United States since the *Weeks* decision. Critics of the exclusionary rule have included such esteemed figures as Professor Wigmore, who lamented that "[o]ur way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else."[120] The frustration of critics is summarized best in

---

[115] *Stone*, 428 U.S. at 485.

[116] Similarly, the Canadian exclusionary rule is not premised on deterrence. Canadian developments, however, will be addressed below.

[117] David M. Paciocco, *The Judicial Repeal of § 24(2) and the Development of the Canadian Exclusionary Rule*, 32 CRIM. L.Q. 326, 336 (1990). The Canadian commentator made this observation in relation to the American experience. *See id.*

[118] *See* United States v. Peltier, 422 U.S. 531, 561–62 (1975) (Brennan, J., dissenting) ("[I]f a majority of my colleagues are determined to discard the exclusionary rule in Fourth Amendment cases, they should forthrightly do so, and be done with it. . . . [Covert erosion] demeans the adjudicatory function, and the institutional integrity of this Court.").

[119] WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 19 (1987).

[120] DEAN J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2183 n.64 (1961).

Justice Cardozo's observation that, "[t]he criminal is to go free because the constable has blundered."[121]

It is not my purpose to revisit the historical debate surrounding the exclusionary rule, or to canvass all of the arguments that have been put forward on both sides. To this "little of value can be added."[122] Arguably, the historical debate is capable of being encapsulated into seven general criticisms and responses:

1) *Criticism*—The criminal is to go free because the constable has blundered.[123]

Response—Criminals do not go free because the constable blundered, but rather because official compliance with the requirements of the Fourth Amendment makes it more difficult to catch criminals. It is not the exclusionary rule but the Fourth Amendment which imposes a cost in lost convictions.[124]

2) *Criticism*—The exclusionary rule serves to handcuff the police in their legitimate and important effort to enforce the criminal law.[125]

Response—It is the constitutional rule, not the exclusionary sanction, which imposes limits on the operation of the police. If the police abide by the Constitution, there would be no evidence to exclude. The exclusionary rule, by definition, operates only after incriminating evidence has been obtained and flaunts before us the costs we must pay for constitutional safeguards.[126]

3) *Criticism*—The exclusionary rule does not provide a remedy for innocent persons who are the victims of unconstitutional conduct. The rule exclusively serves to benefit the guilty.[127]

Response—The Fourth Amendment protects everyone against unreasonable searches and seizures. The exclusionary rule inures to the benefit of all by decreasing the likelihood that anyone, "innocent" or "guilty," will be subjected to an unconstitutional search or seizure. In this fashion, individual liberty is benefited on a general level by the rule.[128]

---

[121] People v. Defore, 150 N.E. 585, 587 (1926).

[122] *Id.*

[123] *Id.*

[124] *See* Stewart, *supra* note 10, at 1392–93; Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 44, 47 (1987); United States v. Leon, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting).

[125] LAFAVE, *supra* note 119, at 22.

[126] John Kaplan, *The Limits Of The Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974).

[127] MALCOLM R. WILKEY, ENFORCING THE FOURTH AMENDMENT BY ALTERNATIVES TO THE EXCLUSIONARY RULE 12 (1982).

[128] *See* Cann & Egbert, *supra* note 101, at 312; Roger B. Dworkin, *Fact Style Adjudication and*

5) *Criticism*—Suppression motions, in which defendants seek the benefit of the exclusionary rule, unnecessarily shift the focus of the trial away from the defendants' guilt or innocence. These hearings are costly and distract judges from other important matters. Finally, the court is not the proper forum to discipline police officers for their unconstitutional activities.[129]

Response—Courts should be preoccupied with the manner in which evidence has been obtained, otherwise the Constitution's guarantees would be rendered meaningless. It is the courts that must assume the role of being the final arbiters of individual rights. Absent such judicial scrutiny, constitutional violations would go unnoticed. Similarly, without continual judicial review, the Constitution's guarantees would remain unarticulated and rarely defined. The Constitution would only be expounded in rare actions for assault, trespass and false imprisonment, and prosecutions for resisting arrest or obstructing the police in the execution of their duty.[130]

6) *Criticism*—The exclusionary rule confers a disproportionate benefit on a defendant. A relatively minor violation of the Constitution results in the exclusion of evidence and necessitates that a guilty defendant go free. This windfall is contrary to the idea of proportionality that is essential to the concept of justice.[131]

Response—This criticism is only significant if one conceives the purpose of the rule to be compensation of the individual victim.[132] If the compensation rationale is used, however, the criticism remains inaccurate. A number of exceptions to the exclusionary rule have been created to ensure that all that is excluded is the evidence the police would not have found had they abided by the Constitution. The exclusionary rule does not confer immunity on a defendant against future prosecution; it simply restores him to the position he would have occupied had his constitutional rights not been violated.[133]

---

the Fourth Amendment: The Limits of Lawyering, 48 IND. L.J. 329, 330–31 (1973), *quoted in* Kamisar, *supra* note 124, at 30; Arnold H. Loewy, *The Fourth Amendment is a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983); Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

[129] *See* WILKEY, *supra* note 127, at 14–17.

[130] *See* Brent, *supra* note 22, at 9.

[131] See Stone v. Powell, 428 U.S. 465, 490 (1976) (Powell, J., concurring); Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635 (1982).

[132] *See* Stewart, *supra* note 10, at 1396.

[133] The exclusionary rule reaches evidence which is derived from the primary constitutional violation. *See* Segura v. United States, 468 U.S. 796 (1984). Exceptions exist, however, to ensure that a defendant does not benefit from an undue windfall. Therefore, evidence which was

7) *Criticism*—The exclusionary rule in the United States is anomalous; other democratic nations do not employ an exclusionary rule and they are arguably as free as the United States.[134]

Response—The United States is not alone in employing an exclusionary rule; a number of nations use exclusion of evidence as a means to safeguard individual rights. For instance, England, Scotland, Ireland, Australia, New Zealand, Canada, Germany and France all have some form of an exclusionary rule.[135]

More pertinent for our purposes is the contemporary debate surrounding the exclusionary rule. As noted above, it has been defined by two developments: the Supreme Court's ever increasing emphasis on the deterrent purpose of the exclusionary rule and the cost-benefit analysis that the Supreme Court has developed in determining whether the exclusionary rule should be expanded into new areas, or whether its present application should be further restricted. Due to these developments, the focus of the debate has narrowed significantly over the last twenty years. The current debate is marked by increasing studies into the deterrent value of the exclusionary rule and the cost it exacts in lost prosecutions.

A number of studies have been conducted to evaluate the deterrent effect of the exclusionary rule.[136] There is a complete absence of consistency in the findings of the various studies. Some studies concluded

---

obtained by means sufficiently distinguishable from the underlying illegality that is purged of the primary taint remains admissible. *See* Wong Sun v. United States, 371 U.S. 471 (1963). Similarly, evidence obtained through an independent source who is not connected to the Government's own wrong or illegality remains admissible. *See* Murray v. United States, 487 U.S. 533 (1988); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). In addition, if the evidence would inevitably have been discovered by lawful means, it remains admissible. *See* Nix v. Williams, 467 U.S. 431 (1984); Somer v. United States, 138 F.2d 790 (2d Cir. 1943).

[134] *See* Malcolm R. Wilkey, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 660 (1972); *Bivens*, 403 U.S. at 415 (Burger, C.J., dissenting); Oaks, *supra* note 12, at 701–06.

[135] *See* Brent, *supra* note 22; Dawson, *supra* note 5; MacDougall, *supra* note 21; Williams, *supra* note 5; Baldiga, *supra* note 9; Yeo, *supra* note 5; Pattenden, *supra* note 60; Peiris, *supra* note 5; Craig M. Bradley, *The Exclusionary Rule In Germany*, 96 HARV. L. REV. 1032 (1983); BARTON L. INGRAHAM, THE STRUCTURE OF CRIMINAL PROCEDURE, LAWS AND PRACTICE OF FRANCE, THE SOVIET UNION, CHINA, AND THE UNITED STATES 66 (1995).

[136] *See* Myron W. Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987); Bradley Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 JUDICATURE 398 (1979); S. SCHLESINGER, EXCLUSIONARY INJUSTICE 50–56 (1977); Yale Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 67 (1978); James E. Spiotto, *Search and Seizure: American Empirical Studies of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Oaks, *supra* note 12; Stuart S. Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, WIS. L. REV. 283 (1965).

that the rule has been an effective deterrent,[137] while others find that the deterrent benefits have been marginal at best.[138] Some studies even conclude that the rule has no deterrent benefit whatsoever.[139] "Despite . . . years of sustained discussion with statistics in hand, we still do not know the answer to the question 'does it or does it not deter?'"[140] The increased emphasis on deterrence, coupled with the cost-benefit approach, has caused some commentators to express concern over the future of the exclusionary rule.[141] This apprehension is undoubtedly fueled by the Supreme Court's explicit recognition that "[n]o empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied."[142] At present, the Supreme Court is simply indulging a presumption in favor of deterrence, "[d]espite the absence of supportive empirical evidence."[143] A valid fear exists that the Supreme Court might eventually refuse to continue indulging this presumption and do away with the exclusionary rule on this basis.[144]

Although the deterrent benefit of the exclusionary rule is not clear, studies evaluating the cost of the exclusionary rule in lost convictions are more conclusive.[145] In *Leon,* the Court conducted an extensive review of the various studies and concluded that,

> [the] cumulative loss due to nonprosecution or nonconviction of individuals arrested on felony drug charges is probably

---

[137] *See* SCHLESINGER, *supra* note 136; Kamisar, *supra* note 136.

[138] *See* Oaks, *supra* note 12; Canon, *supra* note 136.

[139] Spiotto, *supra* note 136.

[140] Yves-Marie Morissette, *The Exclusion of Evidence Under the Canadian Charter of Rights and Freedoms: What To Do and What Not To Do,* 29 MCGILL L.J. 521, 533 (1984). The author makes this comment after reviewing the debate in the United States regarding the American exclusionary rule. *See id.*

[141] K.A. Faibi, *The Exclusionary Rule: Not the "Expressed Juice of the Whoolly-Headed Thistle,"* 35 BUFF. L. REV. 937, 939 n.11 (1986).

[142] *Janis,* 428 U.S. at 453 n.22.

[143] *Stone,* 428 U.S. at 492.

[144] *See Calandra,* 414 U.S. at 365 (Brennan, J., dissenting) ("I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search and seizure cases.")

[145] *See* Caldwell & Chase, *supra* note 14, at 50–51; Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment,* 2 U. ILL. L. REV. 223 (1987); Thomas Davies, *A Hard Look At What We Know (And Still Need To Know) About the Costs of the Exclusionary Rule: The NIJ Study and Other Studies of Lost Arrests,* AM. B. FOUND. RES. J. 611; James J. Fyfe, *The NIJ Study of the Exclusionary Rule,* 19 CRIM. L. BULL. 253 (1983).

> in the range of 2.8% to 7.1%. . . . [California] data suggests that screening by police and prosecutors results in the release because of illegal searches or seizures of as many as 1.4% of all felony arrestees, . . . that 0.9% of all felony arrestees are released, because of illegal searches and seizures, at the preliminary hearing or after trial, . . . and that roughly 0.5% of all felony arrestees benefit from reversals on appeal because of illegal searches.[146]

When the percentages are converted into actual numbers the significant impact of the exclusionary rule becomes more apparent. Roughly "30,000 cases were dismissed nationwide in one year because of the exclusionary rule."[147]

Empirical studies on the exclusionary rule have had a profound effect on the debate surrounding the rule. Because the deterrent benefits of the rule are inconclusive, while the costs of its application are readily apparent, a number of commentators have advocated that the rule be abolished and replaced with a more effective and less costly remedy.[148] Similarly, a number of Supreme Court justices have suggested that the rule be replaced, foremost among them Chief Justice Burger.[149]

In *Bivens,* the Chief Justice did not "question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials."[150] He did suggest, however, that Congress replace the rule with some more effective alternative remedy, given the absence of empirical evidence to support

---

[146] United States v. Leon, 468 U.S. 897, 907 n.6 (1984).

[147] BRADLEY, *supra* note 21, at 43.

[148] *See* Robert M. Hardaway, *Equivalent Deterrence: A Proposed Alternative to the Exclusionary Rule in Criminal Proceedings,* 11 CRIM. JUST. J. 357 (1989); Malcolm R. Wilkey, *Constitutional Alternatives to the Exclusionary Rule,* 23 S. TEX. L.J. 530 (1982); Aloysius T. Webster, *Protecting Society's Rights While Preserving Fourth Amendment Protections: An Alternative to the Exclusionary Rule,* 23 S. TEX. L.J. 693 (1982); William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule,* 69 GEO. L.J. 1361 (1981); Raymond G. Hall & Cheryl Dempsey, *The Alternatives to the Exclusionary Rule,* 3 CRIM. JUST. J. 303 (1980); Spiotto, *supra* note 136.

[149] Chief Justice Burger repeated his attack on the exclusionary rule in a number of decisions. *See* Brewer v. Williams, 430 U.S. 387 (1977) (Burger, C.J., dissenting); Stone v. Powell, 428 U.S. 465 (1976) (Burger, C.J., concurring). But Chief Justice Burger did not always stand alone. *See* California v. Minjares, 443 U.S. 916 (1979) (Renqhuist, J., dissenting); *Stone,* 428 U.S. at 537–42. (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 612 (1975) (Powell & Rehnquist, JJ., concurring); Coolidge v. New Hampshire, 403 U.S. 443, 510 (1971) (Blackmun, J., concurring with Burger C.J., dissenting in part and concurring in part).

[150] 403 U.S. at 415 (Burger, C.J., dissenting).

the claim that the rule actually deters police illegality.[151] The Chief Justice then made a specific proposal, "an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated."[152]

Chief Justice Burger's dissenting opinion in *Bivens*, coupled with the ever increasing emphasis on the deterrent purpose of the rule, has generated Congressional activity on the subject of the exclusionary rule. Congress has made repeated attempts to replace the rule with some legislated alternative, but none of the proposed bills have become law.[153] These efforts to replace the exclusionary rule are premised on a number of assumptions, including: (i) the rule is not required by the Constitution; (ii) the rule's only purpose is deterrence; (iii) the rule is an ineffective deterrent; and (iv) some alternative remedy would be more effective in deterring police illegality and would not exact the same toll in lost convictions.

Critics of the exclusionary rule tend to advocate one, or a combination of three, alternative remedies. They assert that these remedies would be just as effective as the exclusionary rule in deterring police illegality. The remedies include: (i) civil damages for those aggrieved by unconstitutional behavior; (ii) prosecution of the individual officers who violate an individual's constitutional rights; and (iii) internal, or even external, disciplinary proceedings against the officers involved.[154] The effectiveness of these respective remedies will be considered when the Canadian experience prior to the *Charter* is addressed.

Critics of the rule, who suggest that alternative remedies should be implemented, tend to focus on the cost in lost convictions that the exclusionary rule exacts. It is curious that these same critics suggest that their proposed remedies would equally, or even more effectively, deter police illegality. If critics are correct about their proposals, the police will abide by the Constitution, in which case the cost will be exactly the same as it is under the exclusionary rule. The only differ-

---

[151] *See id.* at 416.

[152] *Id.* at 422.

[153] *See* MacDougall, *supra* note 21, at 661 n.335; *see also* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 55 (released August 17, 1981) (advocating abolition of the rule); Kenneth Jost, *A Changing Legal Landscape: Anti-Crime and Tort Reform Proposals Likely to Flourish in GOP Congress*, 81 A.B.A. J. 18 (1995) (bill sponsored by Senator Hatch pending in the Senate; it would serve to abrogate the exclusionary rule and replace it with a fortified tort remedy).

[154] *See* Stewart, *supra* note 10, at 1386 (the author reviews each proposal and the criticisms offered against each).

ence is that an effective alternative remedy "would not 'rub our noses' in the Fourth Amendment the way the exclusionary rule does."[155]

The contemporary debate regarding the exclusionary rule is directly linked to the decisions that first established the rule. "None of the three Supreme Court cases credited with producing the rule focused on whether the exclusionary rule, as we know it, should exist—yet somehow, in 1914, after all three cases had been decided, the rule was established."[156] The absence of a clear rationale for the rule allowed the Burger Court to focus on deterrence to such an extent that the rule's sole justification has been transformed into the greatest threat to its continued applicability.[157]

The American debate has thus been reduced to a question of deterrence. This has positioned the combatants in the debate in two diametrically opposed positions, those who claim the rule deters and should be retained versus those who claim the rule is an ineffective deterrent and should be abolished. There is no middle ground in this debate. In drafting the *Charter,* Canada had the benefit of considering the American approach. In an effort to avoid repeating the American experience, the Framers of the *Charter* specifically incorporated a provision into the text addressing the issue of what should be done with unconstitutionally obtained evidence.

IV. BIRTH OF CANADIAN EXCLUSIONARY RULE AND ITS RATIONALE

Historically, Canada had long taken the position that the means by which evidence had been obtained were irrelevant to admissibility.[158] In 1960, a real prospect existed that this position might change with the enactment of the Canadian Bill of Rights.[159] Canada's Constitution, enacted in 1867, had not contained a bill of rights. In the post-war era, Canada grew increasingly dissatisfied with the absence of a codified instrument setting out basic rights and freedoms.[160] But the response to this disenchantment was not constitutional reform. Instead, the Canadian Bill of Rights was an ordinary act of the Federal Parliament.

---

[155] Kamisar, *supra* note 124, at 47.

[156] Stewart, *supra* note 10, at 1372.

[157] *See* Lane V. Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle,* 69 J. CRIM. L. & CRIMINOLOGY 141, 148 (1978) ("[T]he failure of the earlier cases to clearly articulate a constitutional basis for those decisions led to this drift.").

[158] *See* R. v. Doyle, 12 O.R. 347, 353 (C.A. 1886) (Can.).

[159] Can. Bill of Rights Act, R.S.C. 1970, app. III.

[160] PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 639 (1985).

Despite this deficiency, the Canadian Bill of Rights incorporated a number of provisions that attempted to ensure fair treatment for individuals who were detained in relation to, or charged with, a crime.[161]

The Canadian Bill of Rights did not address how the courts should deal with evidence that had been obtained in violation of its provisions. Early decisions under the Act suggested that evidentiary exclusion might automatically flow from a violation.[162] These developments, however, were short-lived. The Supreme Court eventually rejected evidentiary exclusion to remedy violations of the Bill of Rights.[163] Instead, the Court clung to the conventional common law rule; evidence remained admissible no matter how it was obtained, even if the Bill of Rights had been violated in the investigative process.[164]

In 1971, wholly apart from the Bill of Rights, the Supreme Court of Canada reconsidered the scope of judicial discretion to exclude illegally obtained evidence.[165] The Court articulated a more restrictive position than that taken by the Privy Council in *Kuruma.* Evidence could be excluded if admission would unfairly affect the accused. Unfairness, however, would only arise if the evidence was gravely prejudicial, its admissibility tenuous, and its probative value slight.[166] This rule was "diametrically opposite the American position and radically divergent from the British. [In effect,] [n]o discretion existed to exclude illegally obtained evidence."[167]

American critics of the exclusionary rule, quick to point out the benefits of a justice system without such a rule, regularly made reference to Canadian law during this period.[168] At the time, theoretically,

---

[161] *See, e.g.,* R.S.C. 1970 § 1(a) (right to life, liberty, security of the person and enjoyment of property); § 2(c)(ii) (right upon arrest or detention to retain and instruct counsel without delay); § 2(d) (protection against self-incrimination); § 2(e) (right to a fair hearing in accordance with the principles of fundamental justice). Note that the Canadian Bill of Rights did not incorporate a provision limiting the search and seizure powers of police, but these powers were circumscribed by a number of common law rules.

[162] *See* R. v. Gray, 132 C.C.C. 337 (B.C. Prov. Ct. 1962) (evidence excluded); R. v. Ballegeer, 3 C.C.C. 353 (Man. C.A. 1969) (conviction overturned as evidence obtained contrary to Bill of Right wrongfully admitted).

[163] *See* R. v. Hogan [1975] 2 S.C.R. 547, 584 ("I cannot agree that, wherever there has been a breach of one of the provisions of that Bill, it justifies the adoption of the rule of 'absolute exclusion' on the American model which is in derogation of the common law rule long accepted in this country.").

[164] *See* Katz, *supra* note 9, at 120.

[165] R. v. Wray [1971] S.C.R. 272 (defendant's confession involuntary and excluded pursuant to common law, but physical evidence the defendant located for police admitted).

[166] *See id.* at 293.

[167] Brent, *supra* note 22, at 17.

[168] *See* Caldwell & Chase, *supra* note 14, at 60–62; Shanks, *supra* note 13, at 663–66.

there were three bases for redress by an individual whose rights were violated by police. An aggrieved individual could "sue the police for damages incurred, complain or demand disciplinary action or the laying of criminal charges."[169] American critics of the exclusionary rule may have looked favorably upon Canadian law during this juncture, but Canadian courts grew uneasy with their complete lack of discretion.

In 1977, the Supreme Court of Canada introduced a new concept to Canadian law, "abuse of process."[170] The concept, with origins in civil law, referred to the inherent power of the court to control its own process. Under this doctrine, a court reserved the power to stay proceedings, effectively discontinuing the prosecution, if it felt that compelling the accused to stand trial would violate those fundamental principles of justice that underlie the community's sense of fair play and decency. The Supreme Court indicated that this power was necessary to prevent the abuse of the court's process through oppressive proceedings.[171]

The difficulty with the abuse of process doctrine was that it could only be employed to bring an entire prosecution to a halt. Some members of the Supreme Court, dissatisfied with the limited tools that the judiciary had at their disposal to ensure the integrity of the judicial process, desired a more precise remedial instrument. In *Rothman v. The Queen*,[172] decided a year before the *Charter* was enacted, Justice Lamer had urged a reconsideration of the traditional Canadian approach. He asserted that a discretion should be recognized to exclude otherwise admissible confession evidence if, due to improper conduct by the authorities, its admission would "bring the administration of justice into disrepute."[173]

---

[169] LAW REFORM COMMISSION OF CANADA, THE EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE 7 (1974).

[170] *See* R. v. Kirzner [1978] 2 S.C.R. 487.

[171] *See* Rourke v. The Queen [1978] 1 S.C.R. 1021, 1025–40 (Laskin, C.J., concurring). This newly recognized power was questioned, but it was quickly re-affirmed by the Court. *See* R. v. Krannenburg [1980] 1 S.C.R. 1053, 1061; R. v. Crneck, 17 C.R. (3d) 171, 179–83 (Ont. S.C. 1980).

[172] [1981] 1 S.C.R. 640, 677 (Lamer, J., concurring).

[173] *Id.* at 696 (Lamer, J., concurring). The language used, "bringing the administration of justice into disrepute," was the language that had previously been advocated by the Law Reform Commission of Canada in recommending the adoption of a discretionary exclusionary rule (discussed below). This term eventually was included in section 24(2) of the *Charter*, the provision that deals with the exclusion of unconstitutionally obtained evidence (discussed below). In *Rothman*, Lamer indicated that evidence would bring the administration of justice into disrepute if the conduct of the authorities would "shock the community." *Id.* at 697 (Lamer, J., concurring). But in the

Arguably, the development of the "abuse of process" doctrine, coupled with the expressed desire of some judges to revise the traditional common law rule, reflected an increasing judicial frustration in Canada. The Canadian judiciary was growing weary of being relegated to the sidelines in the important business of enforcing individual rights. The Court was uneasy with transferring to the Executive the unencumbered power to determine how rights would be respected and the role of the judiciary in this process.[174] This development is not dissimilar to the American experience following *Wolf*.[175] After *Wolf*, the United States Supreme Court was similarly dissatisfied with its role as mere spectator to the enforcement of the Fourth Amendment in the States. The Due Process Clause was then employed to exclude evidence if it had been obtained through conduct that shocked the conscience, offended a sense of justice or was at odds with the decencies of civilized conduct.[176]

Those who advocate the position that all evidence should be admitted before the court, no matter how it has been obtained, propose that courts simply ignore official illegality. This, as we have seen, places courts in an uncomfortable position that they naturally resist. The United States Supreme Court, before deciding *Mapp*, responded to such a predicament with the *Rochin* holding. Canadian courts reacted in a similar fashion, developing the "abuse of process" doctrine and

---

Supreme Court's first decision under section 24(2) of the *Charter*, *R. v. Therens*, Justice LeDain specifically rejected the "shock the community" interpretation of the same terminology. *See* [1985] 1 S.C.R. 613, 650–2 (LeDain, J., dissenting). He reasoned that some evidence that would bring the administration of justice into disrepute under section 24(2) might not necessarily shock the Canadian community and the court should not substitute for the words of section 24(2) another expression of the standard, drawn from a different jurisprudential context. The majority did not reach the issue. *See id.* But this reasoning was adopted by a majority of the Supreme Court in its seminal decision on section 24(2). *See* Collins v. The Queen [1987] 1 S.C.R. 265, 286–87. In *Collins*, the Court emphasized a second distinction. In *Rothman* there was merely police illegality. In contrast, under section 24(2), a violation of the *Charter* will have been established. The fact that the "most important law in the land" has been violated requires a lower threshold for evidentiary exclusion. *See id.*

[174] The abuse of process doctrine had already been established in England. *See* Connelly v. Director of Public Prosecutions, [1964] App. Cas. 1254, 1354 (U.K.) (Lord Devlin had indicated, [A]re the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.).

[175] It should be recalled that *Wolf* made the Fourth Amendment applicable to the states, but did not extend the exclusionary rule along with it. *See* 367 U.S. 643.

[176] *See* Rochin v. California, 342 U.S. 165, 172–73 (1952).

advocating a relaxation of the traditional common law rule. These developments are not anomalous; courts in other democratic nations like England, Scotland and Australia have responded in an analogous manner.[177]

In democratic nations, where a premium is placed on individual liberties, courts naturally resist efforts aimed at making them mere spectators in the important business of protecting individual rights. In such nations, when police illegality yields evidence of a crime, courts are inevitably called upon to impose a coercive sanction on the aggrieved defendant. To ask courts to employ their coercive powers against the defendant, without ever considering the process that brought him before the court, understandably prompts a judicial response. The judiciary's desire to maintain the integrity of the courts, and appear removed from government illegality, was beginning to be felt in Canada prior to the *Charter.*

During this period, some Canadian judges were openly expressing their disenchantment with the traditional common law approach. A respected Canadian jurist questioned whether rights,

> should be at the mercy of law enforcement officers and a blind eye turned to their invasion because it is more important to secure a conviction. The contention that it is the duty of the Courts to get at the truth has in it too much of the philosophy of the end justifying the means.[178]

This dissatisfaction was not restricted to members of the judiciary. Even the Law Reform Commission of Canada advocated the adoption of a discretionary exclusionary rule.[179] In making this recommendation, the Commission discounted the importance of deterring police misconduct, maintaining, instead, that such a rule was needed to protect the integrity of the judicial process.[180]

---

[177] The English, Scottish and Australian experiences were discussed above. *See supra* notes 22–63 and accompanying text.

[178] R. v. Hogan [1975] 2 S.C.R. 547, 597 (Laskin, J., dissenting).

[179] LAW REFORM COMMISSION OF CANADA, REPORT ON "EVIDENCE" 22 (1975) [hereinafter REPORT ON EVIDENCE]. The Commission recommended including a provision in the Evidence Act that required evidence to be excluded, "if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute." *Id.* A similar provision was recommended in the province of Ontario. *See* THE ONTARIO LAW REFORM COMMISSION, REPORT ON EVIDENCE 94 (1976).

[180] *See* REPORT ON EVIDENCE, *supra* note 179, at 62. Six years later, in 1981, the Commission conducted an extensive study of search warrants and supporting affidavits issued in seven Canadian cities. *See* LAW REFORM COMMISSION OF CANADA, POLICE-POWERS-SEARCH AND SEIZURE IN

It is difficult to understand these calls for reform if one subscribes to the view, advanced by some American commentators of the period, that alternative remedies had proven effective in Canada.[181] In reality, the ineffectiveness of Canada's alternative remedies was fueling the demand for reform. Many were expressing doubts with regard to these remedies; "[t]hey are said to have their sanction in separate criminal or civil proceedings, of which there is little evidence, either as to recourse or effectiveness; or, perhaps, in internal police disciplinary proceedings against offending constables, a matter on which there is no reliable data in this country."[182]

In 1981, a Royal Commission (The McDonald Commission) inquired into the activities of the Royal Canadian Mounted Police (R.C.M.P.), the country's national police force which had long been credited in Canada, and internationally, for its professionalism. The inquiry had come on the heels of a well-publicized scandal after it was discovered that members of the force had been responsible for a break-in at the offices of a "left wing" organization. The surreptitious search had occurred without a warrant. After hearing extensive testimony and reviewing internal R.C.M.P. files, the Commission concluded that without judicial condemnation of unlawful police conduct, police officers believed that illegal practices were implicitly approved of by the judiciary.[183] For this reason, the Commission added its voice to the chorus of those calling for the adoption of a discretionary exclusionary rule.[184]

Canada's alternative remedies had failed to deter police illegality or appease the judiciary's desire to play some role in safeguarding individual rights. Although aggrieved individuals could theoretically sue the police and the government, in the years prior to the *Charter* there are only two reported appellate cases in Canada involving such claims.[185] Those individuals most likely to be victims of police illegality, the young, the homeless, the poor, racial or ethnic minorities, and

---

CRIMINAL LAW ENFORCEMENT 84, 297–98 (1981). A judicial panel reviewed the warrants and concluded that on average, 58.9% of warrants issued nationally were invalid. *See id.* The Commission advocated that evidence obtained through illegal warrants should be excluded where its admission would tend to bring the administration of justice into disrepute. *See id.*

[181] *See* James E. Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & ADMIN. 36, 45–46 (1973); Shanks, *supra* note 13, at 665–66.

[182] *Hogan* [1975] 2 S.C.R. at 595 (Laskin, J., dissenting) (Can.).

[183] COMMISSION OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE, FREEDOM AND SECURITY UNDER LAW 1039–40 (1981).

[184] *See id.* at 1039–40.

[185] *See* Spiotto, *supra* note 181, at 45–49.

political dissidents, are also the least likely to pursue legal redress for police wrongs. At the same time, damage awards, in those rare instances where an action was brought, were so trifling that there was little incentive to fund a civil action. In one of the two reported cases, for example, the successful plaintiff was awarded one dollar.[186]

Prosecutions of the police for their illegal deeds were also infrequent, unless the illegality was so severe that it created a public outcry. This is understandable given that prosecutors work closely with the police on a daily basis. Prosecutors proved sympathetic to police officers who overstepped the boundaries, not for personal profit or gain, but in an effort to catch the "bad guys." In those rare cases where police officers were prosecuted, charges were usually laid that would minimize the impact on the individual officers involved. A good example is provided by the R.C.M.P. scandal detailed above.[187] Instead of being prosecuted for the conventional criminal offense they were guilty of, breaking and entering, a more obscure charge was laid. The officers did not go to jail and their careers were not jeopardized.

Although police complaint procedures existed in Canada, another Royal Commission concluded that there was a "tendency among policemen to cover up each other's errors and to keep silent concerning improper actions of brother officers."[188] Internal police discipline in Canada suffered from the typical problem associated with such measures everywhere: police officers investigating other officers are naturally sympathetic to their brethren, especially where the claimed misconduct relates to overstepping the permissible boundaries in pursuing "criminals." In Canada, like the United States, police have vigorously opposed civilian-controlled police review boards. Such a body has been created in England, but it suffers from the same deficiency that has plagued an effective tort remedy. The vulnerable members of

---

[186] *See id.* at 45 n.46.

[187] *See* R. v. Coutellier, Cobb and Cormier (unreported decision) (Que. S.C. 1977). Instead of being prosecuted for breaking and entering, the officers were charged with willfully disobeying a federal statute (the Criminal Code). *See id.* The penalty for the latter offense allowed the judge to accede to the prosecutor's request that a "conditional discharge" be imposed. *See id.* The officers did not go to jail and the disposition, which is tantamount to a judicial pardon, allowed the officers to remain on the force. *See id.* For a discussion of the reluctance of Canadian authorities to prosecute police officers for illegal conduct in the course of investigating crime, *see* B.P. Archibald, *The Law of Arrest in Canada, in* CRIMINAL PROCEDURE IN CANADA, STUDIES 163–64 (Vincent DelBuono ed., 1982).

[188] THE ROYAL COMMISSION INTO METROPOLITAN TORONTO POLICE PRACTICES 137 (1976).

society, who are most likely to be aggrieved by police misconduct, are the least likely to file complaints.[189]

An inquiry into the effectiveness of alternative remedies is only pertinent if one subscribes to the view that the sole purpose of evidentiary exclusion is deterrence of police impropriety. This is why the deterrence of prospective police misconduct has figured so prominently in the contemporary American debate, which is consumed with the issue of deterrence. But in Canada, as in England, Scotland and Australia, deterrence was not the driving force underlying the demand for reform. It was the integrity of the judiciary and the legal system, not deterrence, that lead Canada to reconsider its position on illegally obtained evidence.

The catalyst for reform came during the 1981 debate surrounding the creation of a Charter of Rights and Freedoms. The move towards a constitutional instrument, defining the basic rights and freedoms of Canadians, was undoubtedly linked to the ineffectiveness of the statutory bill of rights enacted in 1960. The 1960 Canadian Bill of Rights only applied to the Federal government, not the provinces, and it had been given little effect by the courts.[190]

The *Charter*'s Framers specifically chose to incorporate a number of provisions that would place limitations on the investigatory powers of the police and ensure fairness to the criminal defendant in the trial process.[191] However, the original drafts of the Canadian *Charter* did not contain provisions dealing with how the rights and freedoms guaranteed were to be enforced. Many were concerned that such an omission would render the *Charter* as ineffectual as the Canadian Bill of Rights.

---

[189] *See* Williams, *supra* note 5, at 328 (also noting that the system has additional flaws, including the fact that the complainant must initiate the procedure, involvement is costly in terms of time and days lost from work, and the complainant, who must identify himself, may fear reprisals).

[190] See HOGG, *supra* note 160, at 650. For a more detailed discussion of the Canadian Bill of Rights ineffectiveness, *see* Stanley Cohen, *Criminal Procedure and The Canadian Charter of Rights and Freedoms, in* CRIMINAL PROCEDURE IN CANADA, STUDIES 6–12 (Vincent M. DelBuono ed., 1982). After the *Charter* was introduced, members of the Supreme Court of Canada even conceded the poor experience under the Canadian Bill of Rights. In *R. v. Therens*, Justice LeDain indicated that the Court cannot,

> avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the courts have felt some uncertainty and ambivalence in the application of the Canadian Bill of Rights because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.

[1985] 1 S.C.R. at 638–39 (LeDain, J., dissenting).

[191] The Canadian *Charter*, *supra* note 1.

This led to demands that remedial provisions be included, as one commentator observed at the time:

> Declaring rights to exist does not stop a person from discriminating on the grounds of race or colour; declaring freedom from arbitrary arrest or search does not stop a person being arbitrarily arrested or searched; asserting a right to reasonable bail does not stop a person being denied bail. The real problem in Canada is not the existence of generally accepted rights (even if they are difficult to formulate with precision) but the existence of adequate remedies for the violation of those rights. What should be examined is the entrenchment of their enforcement . . . . [I]f rights and freedoms are important enough to put in a constitution, then the enforcement of those rights and freedoms are important enough to be included too.[192]

The Joint Subcommittee of Parliament and the Senate, which was charged with the responsibility of refining the provisions in the early drafts of the proposed Canadian *Charter*, eventually realized the "futility and possible confusion of enacting a constitution without entrenched remedies."[193]

But the question arose as to what type of remedy should be available when the violation of an individual's constitutional rights has disclosed criminal evidence. In answering this question, Canada benefited not only from its own experience, and that of other Commonwealth countries, but most importantly from the American experience under the U.S. Bill of Rights.

Silence in the Canadian *Charter* on the question of unconstitutionally-obtained evidence was not an option, because "in the absence of guidelines, one must foresee what some would consider the excesses of the American experience being imported into Canada."[194] After much debate, in which some had advocated a provision specifically prohibiting the use of evidentiary exclusion, a compromise was reached.[195] The

---

[192] Alan W. Mewett, *Entrenching the Enforcement of Rights*, 23 CRIM. L.Q. 129, 129–30 (1981).

[193] MacDougall, *supra* note 21, at 616.

[194] Mewett, *supra* note 192, at 130.

[195] *See* Paciocco, *supra* note 117, at 354; F.L. Morton et al., *The Canadian Charter of Rights and Freedoms: A Descriptive Analysis of the First Decade, 1982–1992*, 5 N.J.C.L. 1, 31 (1994); Martin L. Friedland, *Controlling the Administrators of Criminal Justice*, 31 CRIM. L.Q. 280, 292 (1989). An

wording settled upon when the *Charter* was entrenched in April 1982, is contained in section 24(2), which provides:

> Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.[196]

The provision is dissimilar to the American exclusionary rule in two material respects. First, the expressed rationale for the rule is the integrity of the administration of justice, "deterrence remains buried under the surface."[197] Second, the provision is really not a "rule" at all. Instead, it confers a discretion on the court to exclude evidence on a very specific basis, namely, whether or not the admission of the evidence would bring the administration of justice into disrepute.[198] The provision,

> enshrines a position with respect to evidence obtained in violation of *Charter* rights that falls between two extremes. Section 24(2) rejects the American rule that automatically excludes evidence obtained in violation of the Bill of Rights. . . . It also shuns the position at common law that all relevant evidence is admissible no matter how it was obtained.[199]

---

early draft would have limited the potential remedies to a judicial declaration, an injunction or similar relief. *See* Constitution Amendment Bill, Bill C-60 (1978) § 24.

[196] Early on in the development of jurisprudence under section 24(2), the Supreme Court pointed out that the French version of the text provided that the evidence should be excluded, if its admission "*could* bring the administration of justice into disrepute." See Collins v. The Queen [1987] 1 S.C.R. 265, 287–88 (emphasis added). The court chose the less onerous French text, over the English, as it better served to protect individual rights. *See id.* Therefore, the term "would" should be read as "could." *See id.*

[197] Morissette, *supra* note 140, at 535. *See also* R. v. Hebert [1990] 2 S.C.R. 151, 178 ("Section 24(2) stipulates that evidence obtained in violation of rights may be excluded if it would tend to bring the administration of justice into disrepute, regardless of how probative it may be. No longer is reliability determinative. The Charter has made the rights of the individual and integrity of the judicial system paramount."); R. v. Therens [1985] 1 S.C.R. 613, 651–52 ("The central concern of s. 24(2) would appear to be the maintenance of respect for and confidence in the administration of justice, as that may be affected by the violation of constitutional rights and freedoms."); Friedland, *supra* note 195, at 295. But some lower courts have noted the punitive and deterrent benefits of evidentiary exclusion. *See* R. v. Woolley, 40 C.C.C. (3d) 531, 545 (Ont.C.A.1988); R. v. Guiller, 25 C.R.R. 273, 304 (Ont.Dist.Ct.1985).

[198] *See* Thompson Newspapers Ltd. v. Dir. of Investigation and Research Combines Investigation Act [1990] 1 S.C.R. 425, 483 (Wilson, J., dissenting).

[199] R. v. Simmons [1988] 2 S.C.R. 495, 532.

In choosing to incorporate an exclusionary provision in its Constitution, Canada recognized that proclaiming rights, in the absence of some remedy, transforms the "rights" into nothing more than "hollow promises."[200] This had been the effect of the 1960 Canadian Bill of Rights and it was this eventuality that was deemed unacceptable. It was increasingly being recognized that "[i]t is a deeply ingrained value in our democratic system that the ends do not justify the means. In particular, evidence or convictions may, at times, be obtained at too high a price."[201] Asking courts to stand idly by, while the government encroaches upon individual freedoms, is inconsistent with the court's integral function in a modern democratic state. In modern democracies, like Canada and the United States, central to the court's function,

> is the belief that the integrity of the court must be maintained. This is a basic principle upon which many other principles and rules depend. If the court is unable to preserve its own dignity by upholding values that . . . society views as essential, . . . [a state] will not long have a legal system which can pride itself on its commitment to justice and truth and which commands the respect of the community it serves.[202]

Contemporary critics of the American exclusionary rule discount the importance of judicial integrity as a justification for the rule. But the experience in other nations, including England, Scotland, Australia and Canada, evidences why a discretion to exclude illegally-obtained evidence is fundamental to preserving judicial integrity in a modern democracy. At the same time, proponents of the American exclusionary rule will undoubtedly be resistant to the creation of a discretionary rule. A discretionary rule, it is feared, will not be as effective in safeguarding individual constitutional rights. Canada's experience since the *Charter* was introduced serves to undermine such arguments.

V. BENEFITS OF A DISCRETIONARY EXCLUSIONARY "RULE": THE CANADIAN EXPERIENCE

In the period prior to the Canadian *Charter*, some American commentators had explained that civil actions in Canada were rare due to the "relative infrequency with which such [rights] violations occur in

---

[200] Brent, *supra* note 22, at 9.
[201] R. v. Mack [1988] 2 S.C.R. 903, 908.
[202] *Id.*

Canada."[203] However, one need only review the indexes of the criminal reports in the wake of the *Charter* to discover how common illegal police practices had been in Canada.[204] Prior to the *Charter*,

> the frequency of illegality in police investigations never really came to the attention of the courts or of the public because Canadian courts, until 1982, did not exclude improperly obtained evidence. . . . [T]he irregular methods must have existed on a similar and perhaps even greater scale before. . . . [I]n this regard, the *Charter* has been an eye-opener.[205]

In the early years following the *Charter*'s enactment, the parameters of the discretion conferred by section 24(2) remained largely undefined. Exactly when the "administration of justice could be brought into disrepute" by unconstitutionally obtained evidence was the subject of varied decisions by a number of Canadian appellate courts.[206]

It was five years before the principles that would govern the operation of section 24(2) were firmly established by the Supreme Court of Canada. In *Collins v. The Queen*,[207] the Court set forth needed guidance on the operation of this pivotal constitutional provision. Section 24(2) directs the court to have "regard to all the circumstances" in determining whether the admission of evidence could bring the administration of justice into disrepute. The Court organized the various circumstances to be considered into three general categories: those affecting the fairness of the trial; those related to the seriousness of the violation; and those relating to the effect of excluding the evidence on the reputation of the administration of justice.[208] Each group of factors will

---

[203] Shanks, *supra* note 13, at 665.

[204] Since 1982, there have been thousands of cases decided in which Canadian courts concluded that the police acted unconstitutionally. *See* CANADA LAW BOOK, CANADIAN CRIMINAL CASES INDEX (Charter of Rights Annotations); CANADA LAW BOOK, WEEKLY CRIMINAL BULLETIN INDEX (Charter of Rights Annotations); CARSWELL, CRIMINAL REPORTS INDEX (Charter of Rights Annotations); BUTTERWORTHS, CANADIAN RIGHTS REPORTER INDEX.

[205] Morissette, *supra* note 140, at 535. *See also* DAVID C. MCDONALD, LEGAL RIGHTS IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 229 (1989).

[206] *See* Michel Proulx, *Redefining The Balance of the Criminal Trial: The Effect of the Exclusionary Rule in Section 24(2) of the Charter*, *in* CAMBRIDGE LECTURES 178, 181–89 (1985).

[207] [1987] 1 S.C.R. 265. It is important to note that *Collins* was actually the second case decided by the Supreme Court that dealt with the operation of section 24(2). However, the first case, *Therens*, was a relatively brief judgment. [1985] 1 S.C.R. 613. In *Therens*, the Supreme Court excluded the results of a breath test because at the time of detention the defendant had not been informed of his right to retain and instruct counsel. The decision of the court was too ambiguous to provide firm guidance on the interpretation of section 24(2). *See id.*

[208] *See Collins* [1987] 1 S.C.R. at 283–86; *see also* R. v. Jacoy [1988] 2 S.C.R. 548, 558–59.

be considered individually, with reference in the footnotes to subsequent significant decisions.

A. *Trial Fairness*

The first consideration, trial fairness, weighs heavily in the determination. If the admission of unconstitutionally obtained evidence affects trial fairness, then the evidence should be excluded. Unfair trials, according to the Court, will tend to bring the administration of justice into disrepute. A trial will be rendered unfair if the accused is confronted with conscripted evidence, such as a statement, that would not have existed or could not have been discovered without a *Charter* violation.[209] Such evidence should invariably be excluded because it "strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination."[210] The seriousness of the charge will not affect this determination, as the more serious the offense, the more damaging to the system's repute would be an unfair trial.[211]

In contrast, under the trial fairness consideration, the court distinguished the effect of admitting "real" evidence. Real evidence, like drugs, weapons or documents, generally pre-exists a *Charter* violation and is not brought into existence through a process of self-incrimination. The admission of such evidence will rarely affect the fairness of the trial.[212] The nature of the evidence, however, is not necessarily

---

[209] *See* R. v. Mellenthin [1992] 3 S.C.R. 615, 626–28.

[210] *Collins* [1987] 1 S.C.R. at 284. Under the U.S. Bill of Rights, there is no express provision that a detainee be informed of his right to retain counsel, but section 10(b) of the *Charter* provides such a guarantee. *See id.* In the U.S., a defendant is entitled to be informed of his right to counsel because *Miranda* made this an adjunct entitlement under the Fifth Amendment. See Miranda v. Arizona, 384 U.S. 436 (1966). But because the Fifth Amendment speaks to compulsion, the rule in *Miranda* was rationalized based on the "inherent coerciveness" of custodial interrogation. *See id.* Strict exclusionary rules exist under *Miranda* where a defendant has not been appraised of his right to counsel and a statement is obtained. *See id.* The Supreme Court of Canada's emphasis on self-incrimination, as a factor weighing in favor of exclusion, is not dissimilar to the approach assumed under *Miranda.* It is consistent with a general trend in western nations to treat confession evidence with caution, especially where procedural safeguards, such as the right to speak with counsel, have not been respected.

[211] *See Collins* [1987] 1 S.C.R. at 286. If the admission of the evidence would compromise the fairness of the trial, the good faith of the police will have no effect on the decision to exclude the evidence. The reasoning underlying this position is that an unfair trial will always bring the administration of justice into disrepute, regardless of other considerations. *See* R. v. Bartle [1994] 3 S.C.R. 173; R. v. Elshaw [1991] 3 S.C.R. 24; R. v. Broyles [1991] 3 S.C.R. 595, 619. But if there is ample independent evidence against the defendant, rendering the unconstitutionally obtained evidence relatively inconsequential, the fairness of the trial would not be compromised by the introduction of the evidence. *See* R. v. Smith [1991] 1 S.C.R. 714, 732.

[212] *See Collins* [1987] 1 S.C.R. at 284; *see also* R. v. Debot [1989] 2 S.C.R. 1140; R. v. Simmons

determinative of the trial fairness issue. The admission of unconstitutionally obtained "real" evidence may occasionally affect the fairness of a trial if the defendant was conscripted against himself in the process of locating it.[213]

A final concern, which animates the trial fairness consideration, is whether the evidence at issue would have been obtained in any event.[214] Regardless of what form the evidence takes, if the prosecution can establish that despite the *Charter* violation the evidence would inevitably have been discovered, then its admission will *not* impact adversely on the fairness of the trial. The admission of such evidence has no impact on trial fairness because it would have existed irrespective of the constitutional violation.[215]

[1988] S.C.R. 495; R. v. Dairy Supplies Ltd. [1988] 1 S.C.R. 665. However, evidence emanating from a defendant's person, such as breath, blood or urine, has been characterized as "conscripted." The reason for this classification is that such evidence cannot be obtained without a defendant's participation. Therefore, if internal bodily substances are obtained following a constitutional violation, the evidence will invariably be excluded because its admission is said to compromise the fairness of the trial. *See* R. v. Pozniak [1994] 3 S.C.R. 310; R. v. Harper [1994] 3 S.C.R. 343; R. v. Borden [1994] 3 S.C.R. 145; R. v. Prosper [1994] 3 S.C.R. 236; *Bartle* [1994] 3 S.C.R. at 173; R. v. Dyment [1988] 2 S.C.R. 417; R. v. Pohoretsky [1987] 1 S.C.R. 945. On the basis of similar reasoning, identification evidence resulting from a "line-up" is considered "conscripted." *See* R. v. Ross [1989] 1 S.C.R. 3. Such evidence could not be obtained without the defendant's participation in creating it. *See id.*

[213] One example might be a case in which a defendant's right to counsel is violated, he confesses, and then leads the police to incriminating physical evidence. In such circumstances, the fact that the physical evidence is "real" is immaterial; the court will focus on the self-incriminatory process that resulted in the evidence being located. *See* R. v. Burlingham [1995] 2 S.C.R. 206; *Mellenthin* [1992] 1 S.C.R. at 628–29; *Ross* [1989] S.C.R. at 16–17. Some Canadian commentators have criticized the distinction between "real" and "conscripted" evidence. *See* R.J. Delisle, *Collins: An Unjustified Distinction*, 56 C.R. (3d) 216, 218 (1987); Bruce P. Elman, *Collins v. The Queen, Further Jurisprudence on Section 24(2) of the Charter*, 25 ALTA. L. REV. 477 (1987); Steven M. Penney, *Unreal Distinctions: The Exclusion of Unfairly Obtained Evidence Under S. 24(2) of the Charter*, 32 ALTA. L. REV. 782 (1994).

[214] *See Collins* [1987] 1 S.C.R. at 284–85.

[215] Take the example of a defendant whose right to counsel is violated. Imagine that after the *Charter* violation, the defendant confesses and leads the police to incriminating physical evidence. If the prosecution is able to establish that the physical evidence would have been inevitably discovered, its admission would not impact adversely on the fairness of the trial. Such evidence would have existed irrespective of the *Charter* violation. In contrast, if the prosecution cannot make such a showing, the admission of the evidence would impact adversely on trial fairness because the defendant has been "conscripted" against himself in the process of locating the evidence. *See Burlingham* [1995] 2 S.C.R. 206; R. v. S. (R.J.) [1995] 1 S.C.R. 451. It is only lawful investigative techniques that can be considered as alternative sources of discovery. *See* R. v. Dersch [1993] 3 S.C.R. 768. The burden of establishing that evidence would have been inevitably discovered rests squarely on the prosecution. In the case of confessions obtained after the defendant's right to counsel was violated, the prosecution must establish that a confession would have been made without the *Charter* violation. *See Harper* [1994] 3 S.C.R. 343; *Bartle* [1994] 3 S.C.R. 173.

B. *Seriousness of the* Charter *Violation*

If the admission of unconstitutionally obtained evidence would not affect the fairness of the defendant's trial, the court must next consider the seriousness of the *Charter* violation.[216] In assessing the seriousness of the violation, the principal concern is the conduct of the authorities.[217] Evidentiary exclusion, however, is not to be used to "discipline the police"[218] or as a "remedy for police misconduct."[219] A serious violation weighs in favor of exclusion because it is necessary to prevent having the administration of justice brought into further disrepute by judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies.[220]

In assessing the seriousness of a *Charter* violation, a judge must consider whether the violation occurred "in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, willful or flagrant . . . [or] whether the action was motivated by urgency or necessity to prevent the loss or destruction of evidence."[221] Given

---

[216] The Court has concluded that even if a *Charter* violation is not "serious," if the admission of the evidence would render the defendant's trial unfair it should be excluded. *See Elshaw* [1991] 3 S.C.R. at 45; *Broyles* [1991] 3 S.C.R at 619; *Mellenthin* [1992] 3 S.C.R. at 629–30; *Hebert* [1990] 2 S.C.R. at 207 (Sopinka, J., concurring). The good faith or inadvertence of the police cannot cure either an unfair trial for the defendant or the impact that such a trial would have on the repute of the judicial system. *See Elshaw* [1991] 3 S.C.R. at 45; *Broyles* [1991] 3 S.C.R at 619; *Mellenthin* [1992] 3 S.C.R. at 629–30; *Hebert* [1990] 2 S.C.R. at 207 (Sopinka, J., concurring).

[217] *See Collins* [1987] 1 S.C.R. at 285. It is the conduct of the authorities, throughout the entire investigation, which is pertinent. *See* R. v. Strachan [1988] 2 S.C.R. 980, 1007.

[218] *Collins* [1987] 1 S.C.R. at 275.

[219] *Id.* at 281.

[220] *See id.* at 280–81. In *Collins,* the Court concluded that the drugs discovered through an unconstitutional search should be excluded, emphasizing the "flagrant and serious" *Charter* violation and the need to disassociate itself from the conduct of the police. *See id.* at 288–89.

[221] *Id.* at 285 (*quoting* with approval LeDain's statement in *Therens* [1985] 1 S.C.R. at 652 (LeDain, J., dissenting)). The Court has subsequently held that all mitigating and aggravating factors must be considered. *See Elshaw* [1991] 3 S.C.R. at 39–40; *Strachan* [1988] 2 S.C.R. at 1006. In addition, the Court has since indicated that "good faith" can only be relied upon where the police acted under express statutory authority and were unaware of the statute's constitutional invalidity or were following an accepted investigative procedure later declared unconstitutional. *See* R. v. Genereux [1992] 1 S.C.R. 259; R. v. Wong [1990] 3 S.C.R. 36; R. v. Thomspon [1990] 2 S.C.R. 1111; R. v. Greffe [1990] 1 S.C.R. 755; R. v. Duarte [1990] 1 S.C.R. 30; R. v. Hamill [1987] 1 S.C.R. 301; R. v. Simmons [1988] 2 S.C.R. 495; Casey Hill, *The Role of Fault in Section 24(2) of the Charter, in* THE CHARTER'S IMPACT ON THE CRIMINAL JUSTICE SYSTEM 56 (Jamie Cameron ed., 1996). In order to make out a claim of urgency or necessity, the Court has held that the police cannot rely on evidence discovered after the unconstitutional behavior. *See Greffe* [1990] 1 S.C.R. at 796; R. v. Genest [1989] 1 S.C.R. 59, 70; *Hamill* [1987] 1 S.C.R. at 308. Rather, it is the circumstances known to the police at the time that are pertinent. *See Greffe* [1990] 1 S.C.R.

the emphasis on the conduct of the authorities, the fact that other lawful investigatory techniques would have led to the same evidence tends to render the violation more serious. The failure to proceed constitutionally, when the option to do so was available, evidences a blatant disregard for the *Charter* and weighs in favor of exclusion.[222]

C. *Effect of Excluding the Evidence*

The final group of relevant factors, articulated by the Court, relate to the effect of excluding the evidence. It is against these considerations that the seriousness of the *Charter* violation must be weighed. The ultimate question to be determined "is whether the system's repute will be better served by the admission or the exclusion of the evidence."[223] The potential effect of *either* option must be considered because it would be inconsistent with section 24(2) to exclude evidence if the exclusion would bring the administration of justice into greater disrepute than its admission.[224]

In evaluating the effect of admission or exclusion on the repute of the justice system, a court should not focus exclusively on the individual case presented. Rather, it is the long-term consequences of regular admission or exclusion in analogous circumstances that must be considered.[225] Although the concept of "repute" is related to community perceptions, admissibility is not determined by reference to majority views. Given the *Charter*'s purpose in protecting the individual defendant from the majority, it would be unwise to allow majoritarian views on the subject to predominate.[226] Instead, the relevant question is:

---

at 796; R. v. Genest [1989] 1 S.C.R. 59, 70; *Hamill* [1987] 1 S.C.R. at 308. Further, the necessity or urgency does not give rise to a blanket exception to *Charter* rights; the authorities must still endeavor to keep the unconstitutional behavior to that which is minimally required to deal with the necessity or urgency of the circumstances. *See* R. v. Babinski [1992] 3 S.C.R. 467; *Greffe* [1990] 1 S.C.R. at 796. Although a violation will be tolerated due to urgency or necessity, once the situation giving rise to such a claim has ended, the charter must be complied with. *See Strachan,* [1988] 2 S.C.R. at 1007–08. The police cannot use an earlier crisis to rationalize an ongoing violation of constitutional rights once the crisis has dissipated. *See id.*

[222] *See Collins* [1987] 1 S.C.R. at 285. This approach is stricter than that taken in the United States, where regardless of how egregious the conduct of the authorities, if evidence would inevitably have been discovered it is admissible. In Canada, the converse position has been specifically rejected by the Supreme Court. The fact that police do not have any alternative lawful investigative means to employ does *not* mitigate the seriousness of the violation. In such circumstances, the police must leave the individual alone. *See* R. v. Kokesch [1990] 3 S.C.R. 3, 29.

[223] *Collins* [1987] 1 S.C.R. at 285.

[224] *See id.* 280–81.

[225] *See id.*

[226] *See id.*

"Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances? The reasonable person is usually the average person in the community, but only when that community's current mood is reasonable."[227]

According to the Court, the administration of justice would be brought into disrepute if evidence essential to secure a conviction were excluded because of a "trivial" breach of the *Charter*. The more serious the offense involved, the greater danger for judicial disrepute.[228] On the other hand, if admitting the evidence would result in an unfair trial, the serious nature of the offense charged could not render the evidence admissible. The more serious the offense, the more damaging an unfair trial would be to the repute of the judicial system.[229]

The decision in *Collins v. The Queen*, whether one agrees with the Court or not, undoubtedly served to establish clear guidelines in the exercise of the discretion conferred by section 24(2). The discretion vested in judges, faced with unconstitutionally obtained evidence, cannot be wielded arbitrarily. Lower courts must explain their decision to exclude or admit evidence, within the framework articulated by the Supreme Court of Canada. This permits appellate courts to review the reasoning of trial judges and to ensure consistency of application in the use of section 24(2). Unlike the limited common law discretion that predated the Canadian *Charter*, or the standard for due process

---

[227] *Id.* at 282. It is important to note that common law courts have historically been called upon to apply a "reasonable person" test in a variety of circumstances. Most notably, judges have long been expected to apply this common standard in tort cases. The concept is not new to Canadian law.

[228] *See id.* at 285–86.

[229] *See Collins* [1987] 1 S.C.R. at 285—86. The Court has consistently refrained from considering the harmful effects of exclusion once it is determined that admitting the unconstitutionally obtained evidence would lead to an unfair trial. *See* R. v. Evans [1991] 1 S.C.R 869, 898–99; R. v. Black [1989] S.C.R. 138, 160; R. v. Ross [1989] 1 S.C.R. 3, 16. In such circumstances, an unfair trial would lead to disrepute, and more so as the seriousness of the offense increases. *See* R. v. Evans [1991] 1 S.C.R 869, 898–99; R. v. Black [1989] S.C.R. 138, 160; R. v. Ross [1989] 1 S.C.R. 3, 16. The Court has taken this approach even where the serious charge is one of murder. *See Burlingham* [1995] 2 S.C.R. 206; *Broyles* [1991] 3 S.C.R. 595; R. v. Bridges [1990] 1 S.C.R. 190; R. v. Clarkson [1986] 1 S.C.R. 383. Some Canadian commentators have criticized this emphasis on "trial fairness," claiming that such an approach fails to give adequate consideration to the effect of exclusion, the final factor articulated in *Collins*. *See* Paciocco, *supra* note 117, at 353; Robert Harvie & Hamar Foster, *Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law Under the Charter*, 24 OTTAWA L. REV. 39, 46 (1992); R.J. Delisle, *Mellenthin: Changing the Collins Test*, 16 C.R. (4th) 286, 290 (1993).

review in the United States after *Rochin*, clear criteria exist in Canada to guide courts in the use of their discretion to exclude unconstitutionally obtained evidence.

A discretionary exclusionary rule, that is not coupled with clear criteria, creates a danger that courts will be reluctant to use their exclusionary power.[230] The experience in Canada following *Collins v. The Queen* demonstrates the benefits of articulating specific criteria to guide courts in the exercise of their discretion. Canadian courts have consistently resorted to section 24(2) to exclude unconstitutionally obtained evidence when an application of the *Collins*' criteria has lead to a conclusion that admission could bring the administration of justice into disrepute. In the *Charter*'s first ten years, the Supreme Court of Canada was presented with forty cases in which evidence had been obtained unconstitutionally. In nineteen of the cases, the Supreme Court excluded the evidence, in twenty cases the evidence was admitted, and in one case some evidence was excluded, while some admitted.[231] A similar trend can be seen in lower courts, which have consistently exercised their discretion in favor of excluding evidence.[232]

VI. APPLICATION OF THE CANADIAN DISCRETIONARY RULE OF EXCLUSION TO THE AMERICAN EXCLUSIONARY RULE DEBATE

An examination of the Canadian experience reveals a number of benefits associated with a discretionary rule of exclusion, when such a rule is coupled with clear criteria to control its application. The immediate benefit of a discretionary rule of exclusion is that it avoids the perceived unfairness that has given rise to much of the criticism of the American exclusionary rule.

---

[230] This occurred in England following the Privy Council decision in *Kuruma* [1955] App. Cas. 197, and in Canada following the Supreme Court's decision in R. v. Wray [1970] S.C.R. 272. *See also* Pattenden, *supra* note 60, at 677 (arguing that it is not enough to recognize a discretion, it must be coupled with "fairly specific guidelines").

[231] *See* GERARD E. MITCHELL, THE SUPREME COURT ON EXCLUDING EVIDENCE UNDER THE CHARTER, app. B (1992); Morton et al., *supra* note 195, at 32.

[232] Paul Denis Godin, *A Comparative Study of the Exclusionary Rule and Its Standing Threshold in Canada, the United States, and New York State: The Relation of Purpose to Practice*, 53 U. TORONTO FAC. L. REV. 49, 71 (1995). The author conducts a random survey of reported Canadian cases. The conclusion from this random survey is that in 38% of the cases unconstitutionally obtained evidence was excluded. No comprehensive study of all Canadian decisions on exclusion or admission of unconstitutionally obtained evidence has been conducted, but it is fair to say that exclusion is not infrequent.

In the United States, the gradual evisceration of the exclusionary rule, through the deterrence rationale and the cost-benefit analysis, is fueled by the judiciary's perception that the rule leads to unfairness. Justice Cardozo's criticism that the rule is illogical because it lets the "criminal go free because the constable has blundered"[233] undeniably bottoms most attacks on the exclusionary rule. The perceived unfairness is not alleviated by the response that it is the Constitution and not the rule that sets the criminal free. The fact of the matter remains that the exclusionary rule flaunts before us the cost of constitutional safeguards.

Proponents of an exclusionary rule must concede that the costs of such a rule occasionally seem too harsh. If a defendant charged with murder is released because a relatively minor and unintended violation of his rights disclosed essential evidence, then it is difficult to deny that the rule occasionally exacts too high a price. The problem with the American exclusionary rule is that it is unable to effectively cope with such exceptional cases. Generally, the rule demands that evidence be excluded regardless of society's competing interest in not having a dangerous criminal released back into the community. American proponents of the exclusionary rule argue that the cost in such cases is necessary to safeguard the Constitution's guarantees against governmental encroachment. But the Canadian experience under the *Charter* betrays the flaw in such reasoning.

Unlike the United States, Canadian courts are directed to consider the seriousness of the constitutional violation and balance this concern against the effect of excluding the evidence. The Supreme Court of Canada has recognized that the administration of justice would be brought into disrepute if evidence essential to secure a conviction were excluded because of a "trivial" breach of the *Charter*, especially in serious cases.[234] This position takes into account two factors ignored by the American approach. First, all constitutional violations are not the same, some are more serious while others can be fairly described as technical in nature.[235] Second, contemporary discontent with the

---

[233] People v. Defore, 150 N.E. 585, 587 (1926).

[234] *See Collins* [1987] 1 S.C.R. at 285–86. This fact was also noted by the Australian High Court. *See* Bunning v. Cross 19 A.L.R. 641 (H.C. 1978).

[235] This point is demonstrated by the nature of Fourth Amendment litigation in the United States. Frequently, the motion judge will rule one way on the requirements of the Constitution in a given case. An appellate court may overturn this holding. Finally, the Supreme Court may overturn the appellate court but take a position that differs from the original judge's interpretation of the Constitution. In light of this, it would be naive to suggest that what the Constitution

courts and the Constitution is fueled by a public perception that criminals are permitted to go free due to "technicalities." Although exclusion in such cases may be deemed necessary in the United States to maintain the deterrent benefits of the exclusionary rule, this reasoning ignores the competing justifications for the exclusionary rule.

In examining the experience of England, Scotland, Australia and Canada, it is clear that deterrence is but one competing justification for an exclusionary rule. The integrity of the judicial system has figured prominently in the creation of an exclusionary rule in both Australia and Canada. This rationale was even relied upon in early American jurisprudence. The American rule, at present, ignores the fact that excluding evidence for technical constitutional violations undermines the integrity of the judicial system when the offense charged is serious. In contrast, a discretionary rule, like that used in Canada, permits a court to acknowledge and minimize the deleterious effect on judicial integrity occasioned by evidentiary exclusion in some cases.

American courts, in their effort to limit the application of the exclusionary rule, have focused on deterrence as the rule's sole justification. The emphasis on deterrence, however, has posed an impediment to alleviating the most troublesome aspect of the rule's operation. If deterrence is the exclusionary rule's only purpose, then dangerous criminals must go free, even if a constitutional violation was relatively minor or technical. This reasoning ignores the harmful effect that exclusion may occasionally have on the integrity of the courts. In a free society it is essential that the court command respect within the community, otherwise it will not be long before the authority of the court is diminished and the rule of law is threatened. Should this occur, the collective freedom of everyone within a society would be markedly diminished.

A discretionary exclusionary rule holds other benefits, in addition to addressing the perceived unfairness of an automatic rule. In Canada, the decision whether to exclude or admit unconstitutionally obtained evidence depends on an evaluation of all the circumstances of a particular case. In contrast, in the United States, the "rule" operates automatically subject to an ever increasing list of blanket exceptions.[236] The difficulty with the contemporary American position is the judiciary's effort to scale back the rule's operation through the use of

---

requires is always clear, or that every violation is serious and none are in fact technical or trivial. *See* BRADLEY, *supra* note 21, at 49–51, 55.

[236] *See supra* note 111 and accompanying text.

exceptions. "There are so many exceptions to the rule of exclusion that it is becoming difficult to continue characterizing it as a 'rule.'"[237] The sentencing exception, set out in *Tejada*, is illustrative of the potential problems with this approach.

In *Tejada*, the Court held that unconstitutionally obtained evidence was admissible at a sentencing hearing because deterrence was not be served by excluding the evidence. This exception operates no matter how egregious the conduct of the authorities in securing the evidence. More importantly the exception operates even if the very purpose of the authorities, now aware of the exception, was to secure evidence by unconstitutional means for the sole purpose of using it to obtain a harsher sentence.[238]

The rigidity of the American exclusionary rule, with its exclusive emphasis on deterrence, has spawned numerous inflexible exceptions, resulting in an inconsistent application of the Constitution's safeguards. Some defendants derive a great benefit from the rule's application, especially where the constitutional violation seems minor and the evidence excluded is significant to the government's case. In contrast, other defendants whose constitutional rights are violated are left with no remedy at all. This absolute approach to the exclusion of unconstitutionally obtained evidence may have the benefit of predictability and certainty, however:

> "Certainty can be bought at too high a price." It is only by vesting trial judges with a discretion as to whether to admit or exclude improperly obtained evidence that it will be possible for all the relevant considerations . . . to be taken into account in individual cases. . . . "Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is often the need for individualized justice."[239]

---

[237] Brent, *supra* note 22, at 25.

[238] *See* United States v. Tejada, 956 F.2d 1256, 1261–62 (2d Cir. 1992). The court discounted this potential danger as unrealistic in deciding that the exclusionary rule should not operate in a sentencing hearing. A similar problem plagues all of the "exceptions" to the U.S. exclusionary rule. The difficulty with such exceptions is that once they are entrenched, American courts are powerless to provide redress for unconstitutional conduct aimed exclusively at securing the benefits of one of the myriad of exceptions.

[239] Andrew L.T. Choo, *Improperly Obtained Evidence: A Reconsideration*, 9 LEGAL STUD. J. 261, 282 (1989).

In clinging to an automatic exclusionary rule while claiming that the only justification for the rule is deterrence, American courts have begun to limit the applicability of the exclusionary rule to a whole host of circumstances. In areas subject to such exceptions the Constitution has been rendered meaningless for all practical purposes. This effort to ameliorate the perceived harshness of the exclusionary rule has left many governmental activities immune from constitutional scrutiny. In contrast, a discretionary approach, like that used in Canada, would permit a trial judge to fashion a remedy appropriate to the circumstances without abandoning the prospect of scrutinizing governmental activity in analogous circumstances in future.

The American judiciary's dissatisfaction with the exclusionary rule creates a further difficulty that does not arise when a discretionary rule of exclusion is used. American judges recognize that a finding that police have acted unconstitutionally will necessitate that any evidence obtained must be excluded from the trial. If a perception exists that such a result would be "unfair" in a given case, there is a danger that the judge may bend findings of fact to avoid a conclusion that the Constitution has been violated.[240] Similarly, even if findings of fact are not manipulated, there is a real danger that judges may simply misapply the Constitution to avoid an undesired result. A 1986 study of Fourth Amendment cases decided in nine States reveals that 15.7% of the cases studied resulted in convictions being reversed because lower courts had applied the Fourth Amendment incorrectly. In addition, the same study concluded that another 10.3% of cases should have been reversed but were not because the appellate court also misapplied the Fourth Amendment. In total, 26% of the cases studied involved courts misconstruing the Constitution to the detriment of the defendants.[241] This does not evidence that courts are disingenuous in applying the Constitution 26% of the time, but undoubtedly many of these decisions were the product of individual judges attempting to avoid the harsh consequences of an automatic exclusionary rule.

Under a discretionary approach to the exclusion of unconstitutionally obtained evidence, the question of exclusion is both theoretically and practically separated from a determination of whether a defendant's rights were violated.[242] A Canadian trial judge may freely con-

---

[240] *See* Kamisar, *supra* 124, at 18; Choo, *supra* note 239, at 280.

[241] *See* Craig M. Bradley, *Are State Courts Enforcing the Fourth Amendment? A Preliminary Study*, 77 GEO. L.J. 251, 283 n.182 (1988).

[242] *See* Illinois v. Gates, 462 U.S. 213, 223 (1983). The Supreme Court held that whether the

clude that a defendant's rights were violated, without such a conclusion necessarily leading to the exclusion of evidence. The benefit of such an approach is that the police officer involved always learns of his unconstitutional conduct and in future will be able to act in accordance with the Constitution. In contrast, in the study outlined above, police officers remained ignorant of their unconstitutional behavior in 26% of the cases studied.[243]

There is one final benefit to a discretionary approach to unconstitutionally-obtained evidence. Given that *Mapp* was decided in 1961, many of the courts' constitutional decisions in the area of criminal procedure occurred under the specter of an automatic exclusionary rule. It is impossible to accurately predict how the Constitution's safeguards would have been interpreted in the United States under a discretionary exclusionary rule. The Canadian experience, however, provides some general insight into this question. Comparison between section 8 of the *Charter* and the Fourth Amendment seems particularly appropriate, as the respective constitutional provisions are practically identical.[244]

Some commentators have observed that since *Mapp* was decided, the United States Supreme Court has taken a persistently narrow approach in interpreting the Fourth Amendment.[245] It is claimed that

---

exclusionary sanction is appropriately imposed in a particular case is an issue separate from the question of whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. *See id.* Despite this theoretical separation of the two issues, it is difficult to deny that in most cases a finding that evidence was obtained unconstitutionally will lead to automatic exclusion, unless one of the recognized exceptions to the exclusionary rule is applicable.

[243] Assuming, of course, that the officers in the 15.7% cases overturned on appeal did not learn of the appellate court's decision.

[244] The Fourth Amendment of the Bill of Rights provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Section 8 of the Canadian *Charter* provides: "Everyone has the right to be secure against unreasonable search or seizure." Canadian *Charter*, *supra* note 1 § 8.

In *Hunter v. Southam Inc.*, the Supreme Court of Canada concluded that a valid warrant is a pre-condition for a reasonable search or seizure, where it is feasible to obtain one. [1984] 2 S.C.R. 145. As a result, section 8 parallels the Fourth Amendment. In fact, in *Hunter* the Court held that the purpose underlying section 8 was the protection of an individual's reasonable expectation of privacy. This is the very same purpose that the United States Supreme Court has held to underlie the Fourth Amendment. *See* Katz v. United States, 389 U.S. 347 (1967).

[245] *See Katz*, *supra* note 9, at 117.

this effort to relax the restrictions upon police behavior has been motivated by a desire "to round the sharp edges of the exclusionary rule."[246] Others have offered a harsher explanation, attributing these developments to the "prostituting effect of the exclusionary rule."[247] A brief comparison between American decisions under the Fourth Amendment and Canadian decisions under section 8 of the *Charter* reveals that these criticisms are not unfounded. The Supreme Court of Canada has consistently taken a more expansive view than the United States Supreme Court on the type of police behavior that constitutes an intrusion upon reasonable expectations of privacy warranting constitutional protection.[248]

In the United States, the Fourth Amendment has been held inapplicable where the authorities enter private property and search an area beyond the curtilage of a home. There is no reasonable expectation of privacy in "open fields" according to the United States Supreme Court.[249] But the Supreme Court of Canada has drawn no distinction between curtilage and open fields and consistently characterized any entry upon the property surrounding a residence to be a "search" meriting section 8 scrutiny.[250]

In Canada, the privacy expectations in the home are so great that they include a reasonable expectation of privacy in the approach to a

---

[246] *Id.*

[247] Caldwell & Chase, *supra* note 14, at 53.

[248] *See* Jerome Atrens, *A Comparison of Canadian and American Constitutional Law Relating to Search and Seizure*, 1 SW. J.L. & TRADE AM. 29, 34 (1994). The Supreme Court of Canada has not simply taken a more progressive approach than the United States Supreme Court in the area of search and seizure. On a more general level, American and Canadian academics conducted an extensive review of constitutional jurisprudence in both countries and concluded that "the Supreme Court of Canada now protects the interests of the accused more vigorously than its American counterpart." Robert Harvie & Hamar Foster, *Ties that Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law Under the Charter*, 28 OSGOODE HALL L.J. 729, 734–35 (1990). However, in arriving at this conclusion, the authors refrained from addressing the differing approaches of both nations to the exclusion of unconstitutionally obtained evidence, noting that "a satisfactory comparative treatment of the two countries' exclusionary rules would require an article in itself." *Id.* at 735. However, the discussion that follows focuses exclusively on the area of search and seizure. A more expansive comparison of substantive rights is not engaged in for two reasons: first, as noted earlier, the exclusionary rule debate in the United States has been focused almost entirely on the exclusionary remedy developed under the Fourth Amendment; second, a comparison of this nature is deserving of distinct treatment, which has been effectively undertaken by others. For a more recent comparison by the same commentators, *see* Harvie & Foster, *supra* note 229.

[249] *See* Oliver v. United States, 466 U.S. 170 (1984).

[250] *See* R. v. Plant [1993] 3 S.C.R. 281; R. v. Wiley [1993] 3 S.C.R. 263; R. v. Kokesch [1990] 3 S.C.R. 3.

home. The implied invitation to the public to approach and knock extends no further than is required to permit convenient communication with the occupant of the home, and only those activities that are reasonably associated with this purpose are authorized by the implied license. A police officer who approaches a dwelling for the purpose of securing evidence against the occupant exceeds the implied invitation and conducts a "search" of the home which must comport with section 8 standards.[251]

The disparity in the Canadian and American approaches becomes even more apparent when governmental intrusions involving technological advances are considered. The Supreme Court of Canada has recognized that "methods of electronic surveillance have the potential, if uncontrolled, to annihilate privacy."[252]

In the United States, a government agent is free to surreptitiously record a conversation with an individual. The Fourth Amendment does not apply because everyone assumes the risk that a conversation could be repeated accurately in court, whether through memory or mechanical recording.[253] The Supreme Court of Canada, however, has distinguished between the risk posed by speaking to an informant and the prospect that government agents may be listening to and recording our conversations every time we speak.

> They involve different risks to the individual and the body politic. In other words, the law recognizes that we inherently have to bear the risk of the "tattle-tale" but draws the line at concluding that we must also bear, as the price of choosing to speak to another human being, the risk of a having a permanent recording made of our words.[254]

The same reasoning has been applied to video surveillance. In Canada, an individual's reasonable expectation of privacy is not waived the moment they invite an individual into a private place like a hotel room. According to the Supreme Court,

---

[251] *See* R. v. Evans [1996] 1 S.C.R. 8, 18. But contrast this position with *State v. Petty*, where the Court held that no reasonable expectation of privacy was intruded upon when police approached a residence, knocked on the door, and sniffed for odor of marijuana when the resident opened the door. 740 P.2d 879 (Wash. App. 1987).

[252] R. v. Wong [1990] 3 S.C.R. 36, 47.

[253] *See* United States v. White, 401 U.S. 745 (1971); On Lee v. United States, 343 U.S. 747 (1952).

[254] R. v. Duarte [1990] 1 S.C.R. 30, 48. The Court preferred the approach of American state courts, interpreting privacy guarantees under their state constitutions, over the approach of the United States Supreme Court in *White*. *See id.*

> there is an important difference between the risk that our activities may be observed by other persons, and the risk that agents of the state, in the absence of prior authorization, will permanently record those activities on video tape. . . . To fail to recognize the distinction is to blind oneself to the fact that the threat to privacy inherent in subjecting ourselves to the ordinary observations of others pales by comparison with the threat to privacy posed by allowing the state to make permanent electronic records of our words or activities.[255]

In contrast, such measures would appear acceptable in the United States under the "risk analysis." If one assumes the risk by exposing a private place to public view, then reasonable expectations of privacy are lost; government deception is irrelevant to the constitutional equation.[256]

In the United States, police are free to affix an electronic transmitting device to a vehicle in order to monitor an individual's whereabouts. The Fourth Amendment is inapplicable, as the police could theoretically monitor the vehicle without such a device, therefore no reasonable expectation of privacy is encroached upon.[257] But when confronted with the same issue, the Supreme Court of Canada again rejected the all or nothing approach to privacy expectations that plagues Fourth Amendment jurisprudence. The Court conceded that police could theoretically monitor a citizen's movements while in their vehicle through ordinary surveillance and the use of sensory enhancing devices like binoculars. The Supreme Court of Canada, however, recognized a profound difference between "the threat to privacy inherent in courting the ordinary observations of other members of society . . . [and] the threat to privacy posed by allowing the state to electronically monitor our every movement."[258] State activity in the latter category intrudes upon a reasonable expectation of privacy and is subject to scrutiny under section 8 of the *Charter.*

While taking a more expansive view of the meaning of "search," the Supreme Court of Canada has also asserted a higher standard for

---

[255] *Wong,* [1990] 3 S.C.R. at 48.

[256] *See* Hoffa v. United States, 385 U.S. 293 (1966) (use of secret informers, acting at the behest of government, does not intrude on reasonable privacy expectations); Lewis v. United States, 385 U.S. 206 (1966) (permissible for government agents to misrepresent their identity or purpose in order to obtain access to private places).

[257] *See* United States v. Knotts, 460 U.S. 276 (1983).

[258] R. v. Wise [1992] 1 S.C.R. 527, 564, (LaForest, J., dissenting in the result only).

waiver of this right. If an individual consents to be searched, in either Canada or the United States, constitutional scrutiny is no longer necessary. A valid consent essentially removes the search from the ambit of the Constitution. In the United States, a consent to search is valid if it is voluntarily given.[259] Voluntariness simply means free from duress or coercion. The authorities have no obligation to inform an individual of his or her right to refuse consent. In Canada, a valid consent to search requires more. The individual giving consent must be possessed of the requisite informational foundation for a true relinquishment of the right. He or she must know of the right to refuse consent, before the "consent" will be considered valid.[260]

This brief comparison reveals a significant benefit that flows from a discretionary exclusionary rule. If courts are not preoccupied with the consequences that flow from constitutional violations, they are more inclined to assume a more generous interpretation of the Constitution's guarantees. In the United States, both trial and appellate courts must be cognizant of the effect of their decisions on the case immediately before them. A court's decision will frequently lead to the defendant's being released. This may seem somewhat unfair if the police endeavored to act constitutionally, but were simply unaware of the correct procedure because the law in the area was previously unsettled.

Similarly, appellate courts must also be aware of the effect that their decisions will have on future cases. For instance, a holding by the Supreme Court that an individual must be informed of his right to refuse consent to a search would require automatic exclusion of any evidence obtained in future cases where consent had been given without a prior warning. The Supreme Court would effectively be determining the outcome in countless numbers of future cases, without knowing a thing about the circumstances surrounding those cases.

---

[259] *See* Schneckloth v. Bustamonte, 412 U.S. 227 (1973).

[260] See R. v. Mellenthin [1992] 3 S.C.R. 615, 624–25; *see also* R. v. Borden [1994] 3 S.C.R. 145, 162-63, *quoting with approval* R. v. Wills, 70 C.C.C. (3d) 529, 541 (Ont. C.A. 1992). In *Wills*, the Court held that if the prosecution seeks to rely upon consent to justify what would otherwise be an unauthorized search or seizure, it must establish the following on a balance of probabilities: (i) there was consent, express or implied; (ii) the giver of the consent had the authority to give the consent in question; (iii) the consent was voluntary . . . and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested; (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent; (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and (vi) the giver of the consent was aware of the potential consequences of giving the consent. *See Wills*, 70 C.C.C. (3d) at 541.

When an appellate court's decisions are capable of having such widespread and unforeseen ramifications, it is understandable that the Court will prefer a conservative interpretation of the Constitution over a more expansive rights oriented construction.

The greatest flaw with an automatic exclusionary rule is that it paralyzes both trial and appellate courts in the interpretation of the Constitution. American courts are continually plagued by the unfair effect that their decision might have in the case at issue and in future cases that remain to be litigated. Understandably, American courts are more inclined to find that the authorities have acted constitutionally, even if this requires a regressive and unprincipled interpretation of the Constitution.

> [T]he result of such interpretations of police conduct is a dilution of the individual rights guaranteed bv the Fourth Amendment. While the courts are "saving" reliable evidence from suppression in individual cases, they are also chipping away at some of the protections provided by the Fourth Amendment. The effect on the individual case is short-lived, but the precedential effect of such decisions linger.[261]

A discretionary rule, like that used in Canada, avoids the need to distort constitutional interpretation in order to achieve desired results in individual cases. In Canada, the courts can proceed with interpreting and applying the Constitution without regard to the effect of their decisions on an individual defendant or the outcome determinative impact of a decision on future cases.[262]

In this fashion, a discretionary exclusionary rule leads to a more expansive and honest definition of constitutional rights. The process of rights interpretation in Canada is not tainted by an effort to achieve

---

[261] Caldwell & Chase, *supra* note 14, at 54. *See also* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1483–84 (1985).

[262] For example, in both *Duarte* and *Wise*, the Supreme Court of Canada concluded that each defendant's rights had been violated. *See* R. v. Duarte [1990] 1 S.C.R. 30; *Wise*, [1992] 1 S.C.R. 527. But this conclusion did not result in the evidence being excluded in either case. *See* R. v. Duarte [1990] 1 S.C.R. 30; *Wise*, [1992] 1 S.C.R. 527. In both decisions, the Court emphasized that the violation was not serious because the police had acted in good faith on well-established investigative procedures that had not previously been subjected to constitutional scrutiny. *See* R. v. Duarte [1990] 1 S.C.R. 30; *Wise*, [1992] 1 S.C.R. 527. In contrast, an American court could only avoid exclusion if the police had acted in objectively reasonable reliance on an unconstitutional statute. *See* Illinois v. Krull, 480 U.S. 340 (1987). Absent reliance on a statute, an American court could not avoid exclusion even if the police were operating in an area where the law was previously unsettled.

desired results in individual cases or by the fear that a particular decision will result in automatic evidentiary exclusion in an unforeseeable future case.

CONCLUSION

The unceasing debate regarding the exclusionary rule in the United States is linked to the rule's origins. The American Bill of Rights set out to guarantee individual rights, but failed to address how violations of those rights should be remedied. In a criminal context, American courts determined that two options were available, either ignore such violations or exclude all evidence obtained by violating the Constitution. In crafting a judicial remedy to this perplexing problem, American courts chose an automatic exclusionary rule.

Since its birth, the American exclusionary rule has been the subject of never-ending judicial and academic criticism. The Burger Court, critical of the exclusionary rule, seized upon a fundamental flaw in the evolution of the rule. The piecemeal judicial creation of the exclusionary rule occurred in the absence of a clear rationale underpinning its development. The Burger Court focused on the deterrence rationale as the sole purpose of the rule. In doing this, the Court was able to scale back the rule's operation through the development of categorical exceptions in circumstances where the rule's deterrent benefits were deemed negligible when compared to its costs.

These developments gave rise to the contemporary debate surrounding the exclusionary rule. If deterrence is the exclusionary rule's sole justification, should the rule be maintained if it does not deter? The problem with this debate is its flawed premise. Examination of developments in other democratic states, where police powers are not subject to constitutional controls, reveals that deterrence is but one of many potential justifications for an exclusionary rule. The need to maintain judicial integrity by not sanctioning unlawful police practices has figured highly in the creation of a discretionary exclusionary rule in other democratic nations, like Canada.

The rise of the deterrence rationale has given a needed catalyst to American opponents of the exclusionary rule. They argue that other remedies, beyond evidentiary exclusion, would be just as effective in safeguarding individual rights while avoiding the high cost of exclusion. But examination of developments in other democratic states reveals that other remedies are ineffective in combating or uncovering police excesses. It is for this reason that England, Scotland, and Aus-

tralia fashioned discretionary exclusionary rules. Similarly, the failure of alternative remedies was one of the main reasons that Canada included a discretionary exclusionary rule in its *Charter.*

The debate in the United States is closely linked to the rule's development. The American rule was born on the premise that only two options existed, automatic exclusion or admission. The Canadian experience, under the *Charter,* reveals a third option that combatants in the American debate have ignored. A discretionary exclusionary rule, coupled with clear criteria to guide its operation, is an equally viable alternative. Those who cling to the current rule as the only means to safeguard individual rights ignore the drawbacks of automatic exclusion.

The Canadian experience demonstrates that there are clear benefits to a discretionary approach in dealing with unconstitutionally obtained evidence. A discretionary rule more effectively copes with the competing interests at stake when the state has secured evidence by unconstitutional means. The Canadian experience reveals that a discretionary rule: (i) avoids the unfairness and resulting loss of public confidence in the judicial system that is occasioned by an automatic rule; (ii) does not suffer from progressive narrowing of application, which has left important areas free from constitutional scrutiny in the United States; (iii) does not foster a judicial reluctance to recognize constitutional violations where they have occurred, ensuring that police officers are made aware of their errors and are able to comport their behavior to constitutional standards in the future; (iv) finally, and most importantly, leads to a more progressive and rights-oriented approach in the interpretation of the Constitution's guarantees. Under a discretionary exclusionary rule, constitutional interpretation is not tainted by a judicial desire to achieve justice in individual cases.

The problem with the contemporary American debate surrounding the exclusionary rule is that regardless of which side eventually emerges victorious, no one in fact "wins." If opponents of the rule succeed, the Constitution's guarantees will be reduced to hollow promises. Courts will be left powerless to deal with the excesses of the state, even though the government has deliberately violated the charter of its own existence. Police excesses will be pushed into dark corners, not probed under the sobering light of an independent judiciary.

Claims that there are just as effective alternatives to an exclusionary rule should be viewed with skepticism, in light of the Canadian experience prior to the *Charter.* These concerns, however, may have little effect on those who perceive themselves never to be the victims of

police excesses. Some may be content to allow society's most vulnerable members to fend for themselves in dealing with governmental abuses of power. Surrendering the interests of society's most vulnerable members to the state, however, is fundamentally at odds with the very purpose of a constitutional democracy.

Maintaining the present exclusionary rule is also not a viable option. In its present form, the American exclusionary rule is progressively being whittled away by a judiciary disenchanted with its inability to achieve justice in individual cases. Rather than safeguarding individual liberty, the present rule creates a polluted atmosphere for rights adjudication. The Constitution's protections are being progressively narrowed by regressive interpretations of its guarantees. Unless something is done to remove the incentive for such judicial conservatism, it will not be long before there is no such thing as "unconstitutionally obtained evidence" to be excluded under an automatic rule.

Canada has benefited from a discretionary exclusionary rule under the *Charter*. This rule was fashioned after the American experience under the Bill of Rights was carefully considered. It is time for the United States to stop teaching other nations about the benefits of American constitutionalism and begin learning from the experiences of its pupils. The Canadian experience may hold the answer to a question that has plagued American courts for close to a hundred years. There is a third option for the United States in dealing with unconstitutionally obtained evidence, a discretionary rule of exclusion.